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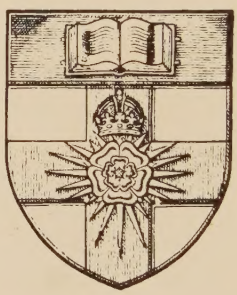

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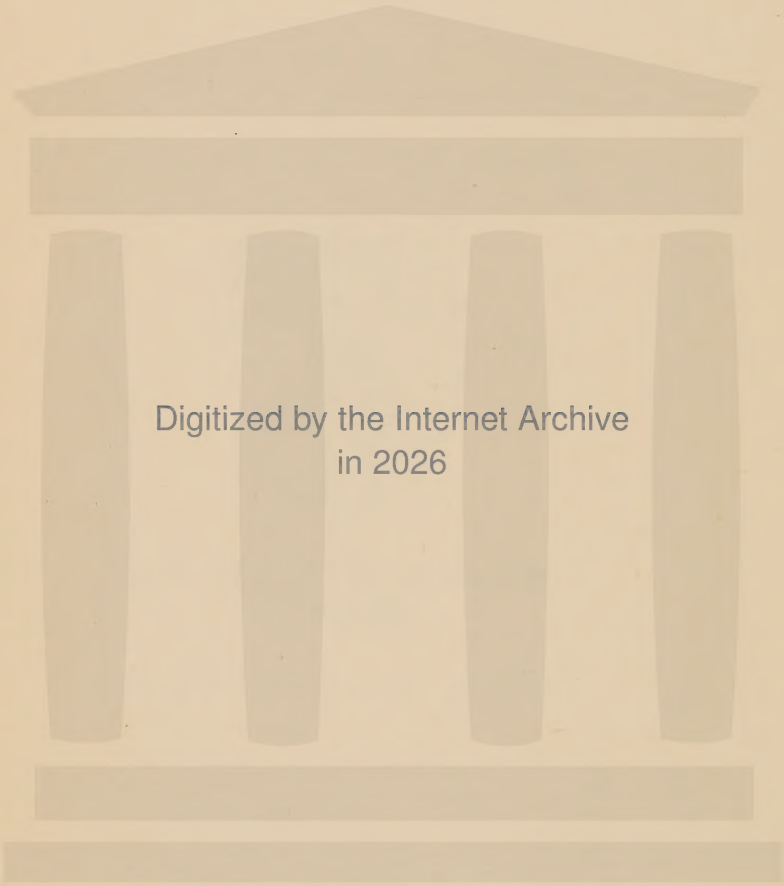
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CASES

DETERMINED BY THE

KING'S BENCH DIVISION

OF THE

HIGH COURT OF JUSTICE

AND BY THE

COURT OF APPEAL

ON APPEAL THEREFROM

AND BY THE

COURT OF CRIMINAL APPEAL

AND BY THE

RAILWAY AND CANAL COMMISSION.

FOOT, Appellant; FINDLAY, Respondent.

1908
Oct. 14.

Adulteration — Certificate of Analysis — Principal Chemist of Government Laboratories—Form of Certificate—Importation of Margarine—Sale of Food and Drugs Act, 1875 (38 & 39 *Vict. c.* 63), *s.* 18; *Form in Schedule—Sale of Food and Drugs Act*, 1899 (62 & 63 *Vict. c.* 51), *s.* 1—*Butter and Margarine Act*, 1907 (7 *Edw.* 7, *c.* 21), *s.* 5, *sub-s.* 1.

In proceedings by the Commissioners of Customs under s. 1 of the Sale of Food and Drugs Act, 1899, as extended by s. 5, sub-s. 1, of the Butter and Margarine Act, 1907, for the recovery of a penalty in respect of the importation into the United Kingdom of an article of food specified therein the certificate of the analysis given by the principal chemist of the Government laboratories need not be in the form prescribed by s. 18 and the schedule of the Sale of Food and Drugs Act, 1875.

Case stated by justices.

At a Court of summary jurisdiction sitting at Southampton an information was preferred by the appellant, an officer of Customs,

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under s. 1 of the Sale of Food and Drugs Act, 1899, against the respondent for that he, the respondent, on February 17, 1908, did import into the United Kingdom, per the steamship *Tadorna*, from Rotterdam, certain margarine containing more than 16 per cent. of water, to wit, 112 pounds weight of margarine, in four packages marked $\frac{J\ K\ F}{V\ Z}$, which was, upon examination of a sample thereof, found to contain $16\frac{9}{10}$ per cent. of water, whereby the respondent had incurred a penalty not exceeding 20*l.*, for which the Commissioners of Customs had elected to sue.

Upon the hearing of the information it was agreed between the solicitors for the appellant and respondent that before any evidence was taken the certificate of analysis should be put in, which was accordingly done.

The certificate of analysis was as follows:—

"Government Laboratories,
London, W.C.

"CERTIFICATE OF ANALYSIS,

"Under the provisions of section 1 of the Sale of Food and Drugs Act, 1899.

"I the undersigned, Principal Chemist of the Government Laboratories, do hereby certify that I received on the eighteenth day of February, 1908, a sample of margarine marked $\frac{J\ K\ F}{V\ Z}$, taken by A. Foot, an officer of Customs, Southampton; that I have caused the same to be analysed, and declare the results of the analysis to be as follows:—

"The sample contains 16·9 per cent. of water, which quantity is 0·9 per cent. in excess of the legal limit.

"As witness my hand this fourteenth day of March, 1908.

"Signature of analysts.

"(Sd.) George Stubbs.

"(Sd.) T. E. Thorpe,
"Principal Chemist."

The solicitor for the respondent then submitted that the certificate was bad, inasmuch as it was not in the form prescribed by s. 18 and the schedule of the Sale of Food and Drugs

Act, 1875, and particularly as the analyst had failed to state therein whether or not any change had taken place in the constitution of the article that would interfere with the analysis thereof as required by that form.

The solicitor for the appellant contended that the certificate was good, inasmuch as the form mentioned in the Sale of Food and Drugs Act, 1875 (1), did not apply to a certificate given by the principal chemist of the Government laboratories under s. 1 of the Sale of Food and Drugs Act, 1899. (2)

(1) Sale of Food and Drugs Act, 1875 (38 & 39 Vict. c. 63), s. 18: "The certificate of the analysis shall be in the form set forth in the schedule hereto, or to the like effect."

The form of certificate in the schedule is, so far as material, as follows:—

"FORM OF CERTIFICATE.

"To

"I, the undersigned, public analyst for the , do hereby certify that I received on the day of , 18 , from , a sample of for analysis (which then weighed), and have analysed the same, and declare the result of my analysis to be as follows:—

"I am of opinion that the same is a sample of genuine

or,

"I am of opinion that the said sample contained the parts as under, or the percentages of foreign ingredients as under.

Observations.*

* ". . . . In the case of a certificate regarding milk, butter, or any article liable to decomposition, the analyst shall specially report whether any change had taken place in the constitution of the article that would interfere with the analysis."

(2) Sale of Food and Drugs Act, 1899 (62 & 63 Vict. c. 51), s. 1:

"(1.) If there is imported into the United Kingdom any of the following articles, namely," (here follows an enumeration of four classes of articles of food, not sufficiently marked, under the headings (a), (b), (c), (d)) "the importer shall be liable on summary conviction for the first offence to a fine not exceeding twenty pounds, for the second offence to a fine not exceeding fifty pounds, and for any subsequent offence to a fine not exceeding one hundred pounds.

"(2.) The word 'importer' shall include any person who, whether as owner, consignor, or consignee, agent, or broker, is in possession of, or in anywise entitled to the custody or control of, the article; prosecutions for offences under this section shall be undertaken by the Commissioners of Customs; and subject to the provisions of this Act this section shall have effect as if it were part of the Customs Consolidation Act, 1876.

"(3.) The Commissioners of Customs shall, in accordance with directions given by the Treasury after consultation with the Board of Agriculture, take such samples of consignments of imported articles of food as may be necessary for the

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The justices were of opinion that the certificate should be in the form prescribed in the schedule to the Act of 1875, and dismissed the information on the ground that the certificate was bad in form.

The question for the opinion of the Court was whether the justices' decision was right in law.

Sir S. T. Evans, S.-G. (*F. F. Daldy* with him), for the appellant. The proceedings here were taken under s. 1 of the Sale of Food and Drugs Act, 1899. Sect. 1, sub-s. 1, of that Act, as extended by s. 5, sub-s. 1 (*f*), of the Butter and Margarine Act, 1907 (1), made it an offence to import into the United Kingdom margarine containing more than 16 per cent. of water, and the importer is made liable upon conviction to a penalty. By s. 1, sub-s. 2, of the Act of 1899, prosecutions for offences under the section are to be undertaken by the Commissioners of Customs, who by sub-ss. 3 and 4 may take samples of imported articles of food for the purpose of analysis by the principal chemist of the Government laboratories; and by sub-s. 5, in any proceeding under the section, the certificate of the principal chemist of the result of the analysis shall be sufficient evidence of the facts therein stated, unless the defendant require that the person who made the analysis be called as a witness. This section deals exclusively with the importation of

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enforcement of the foregoing provisions of this section.

"(4.) Where the Commissioners of Customs take a sample of any consignment in pursuance of such directions they shall divide it into not less than three parts, and send one part to the importer and one part to the principal chemist of the Government laboratories, and retain one part.

"(5.) In any proceeding under this section the certificate of the principal chemist of the result of the analysis shall be sufficient evidence of the facts therein stated, unless the defendant require that the person who made the analysis be called as a witness."

(1) Butter and Margarine Act, 1907 (7 Edw. 7, c. 21), s. 5:

"(1.) There shall be included in the list of articles importation of which is made an offence by section one of the Sale of Food and Drugs Act, 1899, the following articles:—

"(e) Butter containing more than sixteen per cent. of water;

"(f) Margarine containing more than sixteen per cent. of water, or more than ten per cent. of butter fat . . . ."

certain articles of food into the United Kingdom, and its provisions are enforceable, not by the local authority, but by the Commissioners of Customs. It contains a code in itself dealing with the particular matter, and there is no provision therein requiring the certificate of the principal chemist to be in the form in the schedule to the Sale of Food and Drugs Act, 1875. Sect. 22 of the Act of 1899 confirms this view, for there, in dealing with the hearing of an information under the Sale of Food and Drugs Acts, it is provided that the production by the defendant of a certificate of analysis "by a public analyst in the form prescribed in s. 18" of the Act of 1875 shall be sufficient evidence of the facts therein stated, unless the prosecutor requires that the analyst be called as a witness. The Acts have drawn a distinction between a certificate of analysis given by a public analyst and one given by the principal chemist of the Government laboratories. Sects. 10 to 19 of the Sale of Food and Drugs Act, 1875, deal solely with the appointment and duties of the public analyst of the local authority and the proceedings necessary for obtaining an analysis by him. Sect. 18, therefore, which requires the certificate of analysis to be in the form in the schedule or to the like effect, only applies to the certificate of the public analyst. The form in the schedule bears this out, because it begins by saying "I, the undersigned, public analyst for the ," shewing that the form applies only to the public analyst of the local authority. The certificate is therefore good, and the justices' decision was wrong.

The respondent did not appear.

LORD ALVERSTONE C.J. I regret that this case has not been argued on behalf of the respondent, if only for this reason, that there have been a number of cases under the Sale of Food and Drugs Act, 1875, which carried the protection given by the form of certificate of analysis in the schedule to the Act very far, and in some of those cases the proceedings failed because the certificate did not comply with the form. But as far as we can see—and no doubt our attention has been called to everything that is material to the question—those cases have no application

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Lord Alverstone C.J.

to the present case. By s. 1 of the Sale of Food and Drugs Act, 1899, the importation into the United Kingdom of certain articles of food was created an offence. In this list of articles there is included, by virtue of s. 5, sub-s. 1, of the Butter and Margarine Act, 1907, margarine containing more than 16 per cent. of water. By s. 1, sub-s. 5, of the Act of 1899, in any proceeding under that section the certificate of the principal chemist of the Government laboratories as to the result of the analysis shall be sufficient evidence of the facts therein stated, unless the defendant require that the person who made the analysis be called as a witness. The Legislature has by s. 1 of the Act, as extended by s. 5, sub-s. 1, of the Act of 1907, created this offence and has made special provision for dealing with it, and there is no provision requiring the certificate to be in any particular form. There is nothing to shew that the special form of certificate required by s. 18 of the Sale of Food and Drugs Act, 1875, in the case of an analysis under that Act is to apply to a certificate given by the principal chemist of the Government laboratories under s. 1 of the Sale of Food and Drugs Act, 1899. The certificate in the present case is signed by the principal chemist of the Government laboratories, and it seems, as far as I can see, to contain all that is necessary, inasmuch as it states that the margarine contains more than 16 per cent., namely, 16·9 per cent., of water. For these reasons the appeal must be allowed, and the case must go back to the justices for hearing and determination.

BIGHAM and WALTON JJ. agreed.

Appeal allowed.

Solicitor for appellant: *Solicitor of Customs.*

W. F. B.

MUNICIPAL COUNCIL OF SYDNEY *v.* BULL.

1908
Oct. 15.

International Law—Act of Foreign Legislature—Local Statute—Street Improvement—Contribution—Remedy by Action—Action in England.

An Act of the Legislature of New South Wales authorized the Municipal Council of the city of Sydney to carry out improvements in a certain street within that city and imposed upon the owners of property situate within the improvement area the liability to contribute towards the cost of the improvements. For the purpose of enforcing payment of contributions the council were empowered to distrain the goods of the owners liable to contribute and, in addition to the remedy by distress, to recover by action the amounts due and payable.

Being unable to recover by means of distress the amount of contribution due from an owner of property within the improvement area, the council brought an action in this country to recover the amount:—

Held, that the action would not lie in this country, on the grounds (1.) that, the liability being imposed by the foreign State solely for its own domestic purposes, the action to enforce it was analogous to an action to recover a penalty or a tax; (2.) that the action was one relating to real property situate abroad.

Trial of action before Grantham J. without a jury.

The plaintiffs claimed 3919*l.* 4*s.* 3*d.* for rates or contributions alleged to be payable to the plaintiffs by Sir Frederick Cook, Bart., in respect of his property in Moore Street, Sydney, in the State of New South Wales, for the years from 1898 to 1904 inclusive, under the Moore Street Improvement Act of 1890 (54 Vict. No. 30 of the statutes of New South Wales).

By an indenture dated May 16, 1905, the defendant, Henry Bull, covenanted with Sir F. Cook to keep him indemnified against (inter alia) the claim in this action. A third party notice was accordingly, under the Rules of the Supreme Court, Order xvi., part vi., rr. 48 et seq., served on the said H. Bull, who admitted his liability to indemnify Sir F. Cook and obtained leave to defend the action. The said H. Bull is hereinafter referred to as the defendant.

By the Moore Street Improvement Act of 1890 the plaintiffs were authorized and empowered to carry out improvements in Moore Street, in the city of Sydney. For the purpose of carrying out the said improvements and the acquisition of the land

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necessary therefor the plaintiffs were empowered to borrow money, the repayments of which together with interest at 4 per cent. per annum were to be spread over a period not exceeding one hundred years nor less than fifty years.

Towards the cost of the improvements and interest as aforesaid the owners of property situate within the improvement area were by the said Act and by the amending Act, the Moore Street Improvement Act Amendment Act of 1892 (55 Vict. No. 13), to contribute an amount not less than one-half of such cost and interest, and the balance was to be a charge on and paid out of the city fund of the plaintiffs.

From 1898 to 1904 inclusive Sir F. Cook was the owner of property situate within the improvement area, and the amount of contributions payable by him in respect of the said property towards the cost of the said improvements and interest as aforesaid for the said years amounted to 3919*l.* 4*s.* 3*d.*, no part of which had been paid by him.

The said improvements were duly carried out by the plaintiffs in accordance with the provisions of the said Acts.

The plaintiffs contended that by the combined effect of s. 26 of the first-mentioned Act and s. 238 of the Sydney Corporation Act of 1879 (43 Vict. No. 3), repealed by the Sydney Corporation Act of 1902 (No. 35 of 1902) and re-enacted by s. 211 thereof and s. 13 of the Sydney Corporation Amendment Act, 1905 (Act No. 39, 1905) (1), they were empowered to recover by

(1) The Moore Street Improvement Act of 1890 (54 Vict. No. 30), s. 26: "All powers and provisions for enforcing the payment of rates and other sums of money due to the council contained in the 'Sydney Corporation Act of 1879,' or in any other Act relating to the said corporation, shall be applicable, and may be exercised and carried out by the council, and all other persons, for the purpose of enforcing payment of any sum payable, by way of contribution, from any owner of property within an improvement area under this Act."

By the Sydney Corporation Act of 1879 (43 Vict. No. 3), s. 118, repealed by the Sydney Corporation Act of 1902 (Act No. 35 of 1902) and re-enacted by that Act, in case any person liable to pay any rate neglects or refuses to pay the amount thereof to the city treasurer for fourteen days after a notice in the form therein specified that such rate is due has been left at the premises liable for such rate or after he has by any such notice been called upon and required to pay such rate, the mayor may by warrant under his hand distrain the goods and chattels (if any) of such person on the property

action the contribution claimed. The right of the plaintiffs to recover by action in New South Wales was not disputed by the defendant.

Foote, K.C., and *Ringwood*, for the plaintiffs. There can be no doubt that in New South Wales an action of debt upon a statute would lie: see Com. Dig. Dett. (A 9). But where a debt has once been incurred, the action to recover it being in personam, our Courts entertain it, though the cause of action arose abroad, and though the parties be aliens, provided that service of process has been duly effected: see 1 Sm. L. C., 11th ed. p. 621, notes to *Mostyn* v. *Fabrigas*. (1) The Municipal Council of Sydney is for this purpose a mere individual like a railway company. The facts that the debt arose in a foreign country and was contracted with reference to the use of property in the foreign country are not sufficient to deprive these Courts of jurisdiction. Rent for use and occupation of land situate abroad may be recovered by action in this country: *Buenos Ayres and Ensenada Port Ry. Co.* v. *Northern Ry. Co. of Buenos Ayres*. (2)

Simon, K.C., and *Gwyer*, for the defendant. International comity does not extend to the recognition of liabilities imposed by a State on its subjects for its own domestic management and regulation. For that reason the penal laws of a foreign country are not subject-matter of an action in this country: see Dicey,

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assessed or elsewhere in the city, and cause such goods and chattels when distrained to be sold, and out of the moneys to arise thereby may pay all costs, charges, and expenses attendant upon such distress and sale, and shall then pay the amount of the rate for which such distress and sale are made, and pay over any surplus to the person so distrained upon.

The Sydney Corporation Act of 1879 (43 Vict. No. 3), s. 238, repealed by the Sydney Corporation Act of 1902 (Act No. 35, 1902), reenacted by s. 211 of that Act, and amended by the Sydney Corporation Amendment Act of 1905 (Act No. 39, 1905), s. 13: "In addition to the mode of enforcing payment of any sum due and recoverable in respect of any rate, or of any part thereof, and any other amount otherwise payable by any person under the provisions of this Act by the means hereinbefore mentioned, the council may recover any such sum by action or suit against any person liable under the provisions of this Act to pay such sum, and may in any such proceeding recover the arrears of any rates."

(1) (1774) 1 Cowp. 161.

(2) (1877) 2 Q. B. D. 210.

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Conflict of Laws, p. 220, r. 40; nor are suits for the recovery of penalties, pecuniary or otherwise, for any violation of statutes enacted by a foreign State for the protection of its revenue or other municipal laws: *Huntington* v. *Attrill.* (1) For the same reason the Courts of one State cannot be used as a means of collecting the taxes imposed by another: *Henry* v. *Sargeant.* (2) There is no difference between rates and taxes for this purpose, except that a rate is an a fortiori case, for a rate is merely a local tax. The claim in the present case is in its nature a claim to enforce a local rate. The fact that a foreign Legislature allows the amount to be recovered by action does not alter the nature of the claim.

Secondly, there is a difference in this respect between personal actions on the one hand, which may be prosecuted anywhere, and real or mixed actions on the other, which must be prosecuted in the forum rei sitae: Story, Conflict of Laws, s. 554; Dicey, Conflict of Laws, p. 214. Thus an action will not lie in this country for trespass to land situate abroad: *British South Africa Co.* v. *Companhia de Moçambique* (3); nor to recover arrears of a rent-charge issuing out of land situate abroad: *Whitaker* v. *Forbes.* (4) It has been held in the Privy Council that the effect of the Moore Street Improvement Act of 1890 is to impose a charge upon the property within the improvement area: *Sydney Municipal Council* v. *Terry.* (5) An action to realize the charge is a real or at least a mixed action, and must therefore be brought in New South Wales and not elsewhere.

Foote, K.C., in reply.

GRANTHAM J. In my opinion this action cannot be maintained in this country. It is only necessary to look at the titles and preambles of the various enactments cited to see that the legislation is of a merely local character. First, there is the Sydney Corporation Act of 1879; that is intituled "An Act to consolidate and amend the laws relating to the Corporation of the city of

(1) [1893] A. C. 150, at p. 157.
(2) (1843) 13 New Hamp. 321, at p. 332, per Parker C.J.
(3) [1893] A. C. 602.
(4) (1875) L. R. 10 C. P. 583; affirmed 1 C. P. D. 51.
(5) [1907] A. C. 308.

Sydney." It recites that it is expedient to consolidate and amend the law relating to the Corporation of the city of Sydney and to make provision in other respects for the better government thereof as well as for other purposes. By s. 1 the Act may be cited as the Sydney Corporation Act of 1879. It is divided into thirteen parts, which deal with the constitution of the municipal council, the appointment of officers, and the rates, revenues and accounts, and internal management generally of the Corporation of the city of Sydney. Following this line of reasoning, I come next to the Moore Street Improvement Act of 1890. That Act is intituled "An Act to authorize and enable the Municipal Council of Sydney to carry out the improvement of Moore Street within the said city upon an equitable system; to acquire lands and to raise money for carrying out such improvement; to provide for the repayment of the cost of such improvement and the exchange and sale of superfluous lands in connection with the said improvement; and for other purposes." The next enactment is the Moore Street Improvement Act Amendment Act of 1892, which is intituled "An Act to amend the 'Moore Street Improvement Act of 1890.'" The preamble recites that "it is expedient to amend in certain particulars the Moore Street Improvement Act of 1890." Then in the year 1902 there was passed the Sydney Corporation Act of 1902. It is intituled "An Act to consolidate the statutes relating to the Corporation of the city of Sydney." Therefore this legislation is of a purely local character, and the Act on which this question arises is an Act providing merely for the improvement of a street, Moore Street, in the city of Sydney.

Now it is quite clear that if it were not for s. 238 of the Sydney Corporation Act of 1879 the only remedy for the sum sought to be recovered in this action would be by means of distraining upon the goods and chattels of the owner of the land within the improvement area that are found upon that land or elsewhere in the city of Sydney. Apart from that section the amount could not be recovered by action in New South Wales, and certainly not in this country. That section enacts that, in addition to the mode of enforcing payment of any sum due and recoverable in respect of any rate and any other amount otherwise payable by any

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Grantham J.

person under the provisions of the Act by the means therein mentioned, the council may recover any such sum by action or suit against any person liable under the provisions of the Act to pay the same sum, and may in any such proceeding recover the arrears of any rates.

Mr. Foote contends that this enactment enables an action to be brought in this country and makes the Courts of this country auxiliary to the Colonial Courts to this extent at all events, that whereas before the enactment this claim could not have been recovered by means of an action in the Colony, it is now recoverable not only there, but in this country also. Now, in my view, that was not the object or intention of the enactment. Its sole object and intention was to provide that within that area where the claim was recoverable it might be recovered by an action. It was urged that this is in its nature a transitory action. I do not think it is. Some limit must be placed upon the available means of enforcing the sumptuary laws enacted by foreign States for their own municipal purposes. But what restriction is to be imposed on such legislation if this claim could be put in suit in this country? It is true that the contribution which the Municipal Council of Sydney seeks to levy upon the defendant is a contribution in money, but it might be exacted in another form; the Colonial Legislature might have enacted that of those persons whose property had been improved one should plant trees, another should lay drains, and a third should sink wells and find water—provisions which under certain given circumstances might be as wise and equitable as the levy of a rate for contribution in money. Could the persons who omitted to perform these statutory obligations be sued in this country? Certainly not. And the mere fact that in New South Wales the contribution is a money contribution enforceable by action as well as by distress makes no difference. The action is in the nature of an action for a penalty or to recover a tax; it is analogous to an action brought in one country to enforce the revenue laws of another. In such cases it has always been held that an action will not lie outside the confines of the last-mentioned State.

There is also another view of this question which leads to the same conclusion. In Story on the Conflict of Laws, s. 554, the

following passage occurs: "It has been already stated that, by the common law, personal actions, being transitory, may be brought in any place where the party defendant can be found; that real actions must be brought in the forum rei sitae; and that mixed actions are properly referable to the same jurisdiction." In my view this is a mixed action within the meaning of that rule; the claim is in its nature a matter relating to land; s. 238 of the Act of 1879 made the remedy by action available, but that did not alter the nature of the claim or enable the plaintiffs to bring the action in this country any more than a remedy by distress conferred in general terms by the Colonial Legislature would justify a distress in this country. The contention of the plaintiffs would amount to this, that a foreign Legislature by imposing a personal liability upon its own subjects for its own municipal purposes can thereby impose upon the Courts of this country the duty of adjudicating upon questions which by the law of England are not properly cognizable by these Courts. In my opinion the plaintiffs are no more entitled to recover the claim in England than the London County Council would be to recover in Sydney a penalty for a breach of their by-laws. There must be judgment for the defendant.

Judgment for the defendant.

Solicitors for plaintiffs: *Light & Fulton.*
Solicitors for Sir F. Cook: *J. N. Mason & Co.*
Solicitors for defendant: *Crawford, Chester & Slade.*

W. H. G.

1908
Oct. 16.

BOYD, LIMITED *v.* BILHAM.

Distress—Exemption—Wearing Apparel, Bedding, and Tools and Implements of Trade to value of Five Pounds—Law of Distress Amendment Act, 1888 (51 & 52 *Vict. c.* 21), *s.* 4—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 147.

The protection from distress conferred by s. 4 of the Law of Distress Amendment Act, 1888, and s. 147 of the County Courts Act, 1888, is limited to wearing apparel, bedding, tools and implements of trade to the value of 5*l.* in all.

Action tried before Channell J. without a jury.

The plaintiffs' claim was for the return of a pianoforte or its value. The defence was that the piano, together with other goods, was upon premises of which the defendant was landlord, and that the defendant levied a distress for rent due and in arrear in respect of the premises, and under that distress seized the goods on the premises, including the pianoforte.

It appeared that the pianoforte was used by the wife of the tenant of the premises for the purpose of teaching pupils, and Channell J. came to the conclusion that it was an implement of trade within the meaning of s. 4 of the Law of Distress Amendment Act, 1888, and s. 147 of the County Courts Act, 1888. (1) He also found as a fact that wearing apparel and bedding together of the value of 5*l.* were left on the premises after the distress.

(1) Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), s. 4:

"From and after the passing of this Act the following goods and chattels shall be exempt from distress for rent, namely, any goods or chattels of the tenant or his family which would be protected from seizure in execution under section ninety-six of the County Courts Act, 1846, or any enactment amending or substituted for the same. . . . ."

County Courts Act, 1888 (51 & 52 Vict. c. 43), repeals the County Courts Act, 1846.

Sect. 147: "Every bailiff or officer executing any process of execution issuing out of the Court against the goods and chattels of any person may by virtue thereof seize and take any of the goods and chattels of such person (excepting the wearing apparel and bedding of such person or his family, and the tools and implements of his trade, to the value of five pounds, which shall to that extent be protected from such seizure) . . . ."

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BOYD, LIMITED v. BILHAM.

R. J. Drake and *H. B. Samuel*, for the plaintiffs. In s. 147 of the County Courts Act, 1888, the expressions "wearing apparel and bedding" and "tools and implements of his trade" refer to separate classes of articles. The meaning of s. 147 is that to the extent of 5*l.* in value each class of property is privileged. Therefore not less than 5*l.* value of each class must be left, and the seizure of the pianoforte was wrongful: *Lavell* v. *Richings* (1); *Masters* v. *Fraser* (2); *Churchyard* v. *Johnson* (3); *Fenton* v. *Logan*. (4) [Bullen on Distress, p. 115, was also referred to.]

F. Low, K.C., and *S. W. Lambert*, for the defendant. The meaning of s. 147 of the County Courts Act, 1888, is that wearing apparel, bedding, and tools and implements of trade or some or one of those articles to the total value of 5*l.* must be left on the premises. In the present case wearing apparel and bedding together worth 5*l.* were left. The requirements of the statute were therefore satisfied, and the pianoforte was lawfully seized in the distress.

CHANNELL J. In my opinion the defendant is entitled to judgment. A possible construction of s. 147 of the County Courts Act, 1888, is that wearing apparel and bedding to an unlimited amount are privileged from distress, and tools and implements of trade to the extent of 5*l.*; but in my opinion that is not the true construction of the section. I am of opinion that the meaning the words are generally understood to have is correct, namely, that the protection afforded by the section is limited to goods of the kinds mentioned in the section of the total value of 5*l.*

Judgment for defendant.

Solicitors for plaintiffs: *Sayer & Cadle.*
Solicitors for defendant: *C. F. Appleton.*

(1) [1906] 1 K. B. 480.
(2) (1901) 85 L. T. 611.
(3) (1889) 54 J. P. 326.
(4) (1833) 9 Bing. 676.

J. E. A.

Applied. In re NAYLOR BENZON MINING CO LD. [1950] Ch. 567

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March 13; *July* 9, 10, 29.

[IN THE COURT OF APPEAL.]

In re AN ARBITRATION BETWEEN LUCAS AND THE CHESTERFIELD GAS AND WATER BOARD.

Waterworks—Reservoir—Land compulsorily taken—Special adaptability for Reservoir—Compensation.

Where land is compulsorily taken for the purpose of making a reservoir, and the land has a special adaptability for the construction of a reservoir, the tribunal assessing the compensation is not precluded from taking into consideration the special adaptability as an element of value by reason of the fact that the land could not be utilized for the construction of a reservoir by other possible competitors unless statutory powers for its compulsory purchase were first obtained.

In determining the value arising from such special adaptability the tribunal should have regard to the contingent value arising from the possibility of the land coming into the market when required for the particular purpose, and not to the value of the realized possibility arising from the fact of the promoters having obtained statutory powers for the construction of the reservoir.

APPEAL of the Chesterfield Gas and Water Board from a judgment of Bray J. upon an award stated in the form of a special case by an umpire appointed under the Lands Clauses Consolidation Act, 1845. The case is reported [1908] 1 K. B. 571.

The Chesterfield Gas and Water Board, in pursuance of the Chesterfield Gas and Water Board Act, 1904, and of the Lands Clauses Consolidation Act, 1845, served on Bernard Lucas (hereinafter called the claimant) a notice to treat in respect of certain lands which the board required and were authorized to purchase under the Act of 1904. The claimant gave notice that he desired that the amount to be paid him in respect of his claim as owner of the lands should be settled by arbitration, and each party duly appointed an arbitrator. The arbitrators appointed an umpire, and, the arbitrators having failed to agree, the umpire made his award in the form of a special case, of which the material parts were as follows:—

8. By an Act passed in 1826 the Chesterfield Waterworks and Gas Light Company was incorporated for the purpose of supplying

water and gas within the limits prescribed by the Act, and the company acquired the right to take water from the Linacre Brook (in the said Act called the Holme Brook) at a point near the Old Mill Pumping Station, which is a considerable distance below the lowest of the reservoirs hereinafter mentioned.

9. By the Chesterfield Waterworks and Gas Light Company's Act, 1855, the Act of 1826 was repealed, and the company thereby incorporated was dissolved, and in lieu thereof a new company was incorporated under the same name for the purpose (inter alia) of supplying with water the town and borough of Chesterfield, the parish of Brampton, and certain townships in the parish of Chesterfield, or some parts thereof, and the effects of the dissolved company were vested in the new company.

10. By s. 21 of the Act of 1855 the company was authorized (inter alia) to construct a reservoir upon a stream called Linacre Brook or Holme Brook, in Linacre Wood, the property of the Duke of Devonshire, and for that purpose to impound the waters of the Holme or Linacre Brook as shewn on the deposited plans, and to use so much of the said waters as might be necessary for the supply of the inhabitants within the limits defined by the Act. The reservoir was duly constructed by the company, and is hereinafter referred to as the Lower Linacre Reservoir.

11. By the Chesterfield Waterworks and Gas Light Company's Extension Act, 1865, the company was authorized to construct a reservoir upon the Linacre Brook, the embankment of which would be about fifty-three chains westward of and above the Lower Linacre Reservoir.

12. The company duly constructed the said reservoir in pursuance of the powers contained in the Act of 1865. The said reservoir is hereinafter referred to as the Upper Linacre Reservoir.

13. By the Chesterfield Waterworks and Gas Light Company's Act, 1871, the company was authorized to make and maintain an aqueduct or conduit between the Upper Linacre Reservoir and an existing reservoir known as the Club Mill Service Reservoir of the company, together with such tanks, valves, sluices, and other works as should be necessary, and the company was further authorized to enter upon, take, and use such of the

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lands described in the deposited plans and book of reference as it should require for the purposes of such works.

14. By an indenture dated March 9, 1875, and made between John Drabble and the company, the said John Drabble conveyed to the company certain lands for the purpose of making an embankment for the Upper Linacre Reservoir, and also other lands for the purpose of constructing a pipe line from the Upper Linacre Reservoir in accordance with the provisions of the Act of 1871, and by the said conveyance it was declared that the company had, in accordance with the conditions of the agreement for purchase, made and constructed a watering place for cattle at a point marked upon the plan on the conveyance for the use of the said John Drabble, his heirs and assigns, and his and their tenants, to the satisfaction of the said John Drabble, but such condition was not to be construed as imposing upon the company any obligation to supply water from their reservoir or otherwise, and the said John Drabble should not have a right to claim from the company any further or other supply than the natural supply from the brook there.

The said John Drabble was the predecessor in title of the claimant of the property included in the notice to treat.

16. By the Chesterfield Gas and Water Board Act, 1895, the Chesterfield Gas and Water Board were incorporated, and were granted powers to acquire the undertaking of the company, with all its rights, powers, duties, obligations and privileges, and in pursuance of the powers contained in such Act the board have acquired the undertaking of the company.

17. By s. 40 of the said Act it was (inter alia) provided that the rural district council or other sanitary authority within the parishes where the land, the subject of this arbitration, is situated might, subject as therein mentioned, purchase certain parts of the waterworks and plant of the board, being such parts thereof as are within the parishes aforesaid, except the main pipes and other works which should be necessary for supplying with water any other part of the area for the time being included within the limits of the said board.

18. By the Chesterfield Gas and Water Board Act, 1904, the board were authorized to construct a storage reservoir, to be

called the Middle Linacre Reservoir, between the Upper Linacre Reservoir and the Lower Linacre Reservoir, to be formed by means of an embankment or retaining wall across the Linacre Brook, and they were further authorized to divert and impound into the reservoir and works by the said Act authorized any water which they were then authorized to take; but nothing in the said Act was to authorize the board to take any water which they were not then authorized to take. In pursuance of the powers contained in this Act the board have given the notice to treat referred to in this award.

19. Having heard, examined, and considered the allegations of the parties and the documents and evidence of both parties concerning the premises, and having viewed the lands and hereditaments, the umpire came to the following conclusions:—

(*a*) The site in question has peculiar natural advantages for a reservoir site in conjunction with the land on the opposite side of the valley belonging to the Duke of Devonshire, both on account of the general natural configuration of the land and the class of the underlying stratification.

(*b*) The construction of a reservoir by the claimant and the Duke of Devonshire would be interfered with by the pipe line constructed in pursuance of the provisions contained in the indenture of March 9, 1875, and such a reservoir could not be constructed without the consent of the board unless the works of the board were acquired by the rural district council under s. 40 of the Act of 1895, and such district council were to combine with the claimant and the Duke of Devonshire in the construction of a reservoir or were to allow them to construct such reservoir.

(*c*) The claimant could not, except at prohibitive expense, construct a reservoir upon his own land.

(*d*) There is competition for the supply of water within the district in question.

(*e*) Neither the board nor their predecessors have by any Act of Parliament acquired, or possess, any right or powers to impound any water, save and except such powers as are given to them by the Act of 1855 to impound in the Lower Linacre Reservoir so much of the waters of the Linacre Brook as may be

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necessary for the supply of the inhabitants within the limits defined by that Act.

20. Upon the above findings the umpire was of opinion that the special natural advantage of the site as a site for a reservoir was a fit and proper matter for consideration as an element in assessing the value of the lands and hereditaments to be taken, but that he ought not to make any award as compensation for water.

21. Having, therefore, taken upon himself the burden of the reference, he awarded and determined that the sum of 1615*l.* was the amount of the purchase-money and compensation for the fee simple of the lands and hereditaments included in the notice to treat, and for the damage, if any, to be sustained by the owner of the land by reason of the severing of the lands taken from the other lands of such owner or otherwise injuriously affecting such lands by the exercise of the powers of the Act of 1904 or any Act incorporated therewith.

22. The umpire further awarded and determined that the claimant was not entitled to any compensation from the board in respect of any claim for water.

24. The umpire was desirous of stating for the opinion of the Court the question as to whether in estimating the value of the lands and hereditaments to be acquired by the board the natural and peculiar adaptability of the lands in question for the construction of a reservoir was or was not a fit and proper matter for consideration by him as an element in the value thereof in the assessment of compensation, having regard to the fact that such reservoir could not be constructed without the concurrence of the board, unless the works of the board were acquired by the rural district council under s. 40 of the Act of 1895 and such district council were to combine with the claimant and the Duke of Devonshire in the construction of a reservoir or were to concur in such construction by them.

If the Court should be of opinion that in estimating the value of the said lands and hereditaments the natural and peculiar adaptability thereof for the construction of a reservoir was not a fit and proper matter for consideration as an element in the assessment, having regard to the circumstances aforesaid, the award was to be reduced by the sum of 779*l.*

Bray J. held that the umpire was not precluded from taking into consideration in the assessment of compensation the special adaptability of the land for the purpose of the construction of a reservoir, although in the absence of the concurrence of the board the land could not be used for that purpose without further statutory powers.

The board appealed.

March 13. The appeal came on for hearing before Lord Alverstone C.J., Farwell L.J., and Kennedy L.J., when the Court expressed the opinion that the case required in certain respects to be somewhat more clearly stated, and certain questions, which were settled by Lord Alverstone C.J., were directed to be submitted to the umpire for his answer. The questions and answers were as follows:—

1. "In estimating the compensation at 1615*l.* did you assume that any purchaser would have to obtain parliamentary powers to interfere with or acquire the line of pipes belonging to the Chesterfield Gas and Water Board?"—"I assumed my values of the reservoir site on the basis of powers being already in existence either by virtue of an existing Act of Parliament or of an order obtainable from the Local Government Board, which would enable the various authorities interested to acquire the site compulsorily. I have not taken into consideration any expenses which might be incurred by any purchasers in obtaining any further parliamentary powers for the purpose of acquiring the reservoir site, including the line of pipes referred to in the question."

2. "Did you or did you not assume that among possible purchasers were the Chesterfield Gas and Water Board?"—"I did so assume."

3. "If you answer the first question in the negative, what, if any, alteration should you make in the 1615*l.*?"—"None. I had no evidence before me upon that point."

July 9. *W. M. Acworth* (*Balfour Browne, K.C.*, with him), for the water board. The circumstances of the case are such as to prevent any special adaptability of the claimant's land for the

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purpose of the construction of a reservoir forming an element in the value of the land upon an assessment of compensation. The natural configuration of the land and the nature of the strata may no doubt make the land suitable for the construction of a reservoir, but that will give the land no special value if there is no reasonable possibility of the owner of the land being able to avail himself of its suitability for the purpose. The water board's line of pipes runs down the valley which is the site of the proposed reservoir, and under the circumstances no one could be a competitor with the water board for the acquisition of this land for the purposes of a reservoir: the board is the only possible purchaser for that purpose. The umpire was admittedly mistaken in supposing that the rural district council had power under s. 40 of the Act of 1895 to acquire the works of the water board in the parish in which this land was situate, and it is clear that the council could not make a reservoir or acquire the land for that purpose without further statutory powers: *Roberts* v. *Gwyrfai District Council.* (1) They would be very unlikely to get parliamentary powers under the circumstances. The owner of the land could not sell it in the open market for the purposes of a reservoir unless the water board gave their consent to its construction, which, as a public body interested on behalf of the ratepayers and possessed of their existing works and powers, they would not do. No doubt, where several private landowners like the Duke of Devonshire own different portions of an area suitable for a reservoir, it might reasonably be assumed that, if a question arose of purchasing it for the purpose of the construction of a reservoir, their respective pecuniary interests would lead them to be willing to sell for that purpose; consequently the particular portion of the area belonging to each such owner would have a special value by reason of its suitability for the construction of a reservoir, although the reservoir could not be constructed unless all combined to sell. But the same considerations do not apply where part of the area belongs to a public body situated as the water board is in the present case. All the available water is already under their control, and no one could construct a reservoir without purchasing the land on which their

(1) [1899] 2 Ch. 608.

line of pipes is laid, or at any rate obtaining power to make or carry a reservoir over those pipes, while the board would obviously not consent to sell their land or to afford facilities for the construction of a rival reservoir. In order that the special adaptability of the land for the purposes of a reservoir may come into play in such a case there must be a possible competition of purchasers for that purpose and a possible combination of owners to sell for that purpose; in the present case there is neither the one nor the other.

The owner of this land is not entitled to be compensated as for land specially adapted for the purpose of a reservoir, because, under the circumstances, there is no possibility of his rendering it available or obtaining a purchaser for that purpose. No doubt the possibility of a statutory purchaser for such a purpose coming into existence may in a proper case be considered in assessing the value of the land; but in the present case there is no appreciable probability of such a purchaser ever coming into existence.

In any case the present valuation cannot stand. The umpire originally acted on the supposition that the district council had power to acquire the works of the water board. He now states that he valued the land at 1615*l.* on the supposition that powers for the construction of a reservoir on the land had been, or might be, obtained by some body other than the water board by virtue of an Act of Parliament or an order of the Local Government Board; but it is now clear that no statute at present gives such powers, and the Local Government Board cannot give them, and it is very doubtful whether Parliament would be likely to do so in the future. It is impossible that the same valuation can be applicable in a case in which such powers have already been given and in one in which there is merely a more or less remote possibility of their being acquired. Bray J. has held that the fact that the water board itself might become possible purchasers, who would give a special price for the land owing to its special value to them, ought to be considered in assessing the compensation; and he pointed out that the proximity of large works increases the value of adjoining land on account of the probability of additional land being required for them. The

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proximity of a railway or other similar work no doubt often adds to the value of adjoining land and would be properly taken into consideration by valuers as to some extent increasing the value of that land beyond its mere value for agricultural purposes. But it has never been held as a matter of law that the vendor of land taken under statutory powers is entitled to have his compensation assessed with reference to the full extent of the enhancement of value which may be attributable to purposes for which the statutory purchaser is purchasing it: *In re Gough and Aspatria, &c., Water Board.* (1) [He also cited *In re Countess Ossalinsky and Manchester Corporation* (2); *Tynemouth Corporation* v. *Duke of Northumberland.* (3)]

E. Sutton, for the claimant.

[Shortly after the learned counsel had commenced his argument the Court intimated that, while they were agreed that the land had an enhanced value by reason of its proximity to the existing works, they must send the case back to the umpire for reconsideration owing to his mistaken interpretation of s. 40 of the Act of 1895, and they would take time to prepare their reasons.]

Cur. adv. vult.

July 30. VAUGHAN WILLIAMS L.J. read the following judgment:—In this special case, stated by the umpire, it is in paragraph 24 stated: "I (the umpire) am desirous of stating for the opinion of the Court the question as to whether in estimating the value of the said lands and hereditaments to be acquired by the said board the natural and peculiar adaptability of the lands in question for the construction of a reservoir was or was not a fit and proper matter for consideration by me as an element in the value thereof in the assessment of compensation, having regard to the fact that such reservoir could not be constructed without the concurrence of the said board, unless the works of the said board were acquired by the rural district council under

(1) [1904] 1 K. B. 417.

(2) Not reported. Decided in 1883 in the Queen's Bench Division by Grove and Stephen JJ. The judgment of the Court is set out at length in Browne and Allan's Law of Compensation, 2nd ed. p. 659.

(3) (1903) 19 Times L. R. 630.

s. 40 of the Act of 1895, and such district council were to combine with the said Bernard Lucas and the Duke of Devonshire in the construction of a reservoir, or were to concur in such construction by them. If the Court should be of opinion that in estimating the value of the said lands and hereditaments the natural and peculiar adaptability thereof for the construction of a reservoir was not a fit and proper matter for consideration as an element in the assessment, having regard to the circumstances aforesaid, my award is to be reduced by the sum of 779*l.*" This was the question which was raised by the special case and which Bray J. answers in the affirmative. He says: "The question, therefore, that I have to consider is reduced to this—whether the umpire was precluded from considering what I may call the special value of Mr. Lucas's land as an element in its value by reason of the fact that the reservoir could not be constructed without the concurrence of the board, which is the same thing as saying that it could not be constructed except by some body which had obtained parliamentary powers to acquire compulsorily the land of the board lying within the area of the reservoir, and to interfere with the line of pipes"; and he comes to the conclusion that the umpire was not precluded. I agree with Bray J. that the fact that no buyer for reservoir purposes can be found except a buyer who has obtained parliamentary powers does not prevent the special value being marketable, both on the ground that is stated by Stephen J. in *In re Countess Ossalinsky and Manchester Corporation* (1), in the passage quoted by Bray J. (2), and also on the ground that the fact that the board itself might become possible purchasers who would give a special price for the land ought to be considered. And I also agree in the statement of Bray J. that "land adjoining large works would in fact often have a special value because the owner of the works would be likely to require additional land and would be willing to give a larger price because it adjoined his works, and why should not this land have a special value because, if the board desired to build a new reservoir, this was the most convenient site on which to build it?"

When the case first came before the Court of Appeal the

(1) See ante, note (2), p. 24. (2) [1908] 1 K. B. 571, at p. 579.

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Court thought it right to put to the arbitrator certain questions for the purpose of elucidating the special case. These questions and the answers were as follows. [The Lord Justice read the questions and answers.] In the case of *In re Countess Ossalinsky and Manchester Corporation* (1) it will be noted that two objections were taken to the award of the arbitrator giving a sum of 64,000*l.* as the value of the land and a certain contingent valuation depending upon the opinion of the Court upon a special case which he sets out at the end of his award. The objections made on which the rule was granted were these: First, "that the arbitrator in estimating the value of the land has improperly taken into consideration its enhanced value, or alleged enhanced value, by reason of the water that may be collected, diverted, and impounded upon the land, and also by reason of its natural and peculiar adaptation for the construction of a reservoir." The second objection was "that the arbitrator has taken into consideration the increased value of the land in consequence of the powers conferred on the corporation of Manchester by the Manchester Corporation Waterworks Act, 1879." Grove J., after setting out a catalogue (not intended to be exhaustive) of the grounds upon which awards are set aside, says: "The only one of those that can apply to this case is the latter one, that the arbitrator has acted ultra vires; in other words, that he has made an element of his calculation of the value of this land that which legally cannot or ought not to be an element in its consideration, namely, the enhanced value of the land on account of its capability of being used for diverting and impounding water or of being converted into a reservoir, or for any useful purpose for which persons would pay a substantial price. It appears to me that that in itself is not an objection to the award, and that the arbitrator ought to take that into consideration. If the land has what I may call an adventitious value, that is, something beyond its mere agricultural or normal value—and that is a marketable value in this sense, that persons wishing, for a purpose for which the land is peculiarly applicable, to purchase that land would give a higher price for that land—then the arbitrator has a fair

(1) See ante, note (2), p. 24.

right to take that into consideration; it is a matter no doubt contingent, but still it is a matter which is not to be ignored or put out of consideration by an arbitrator." And after giving illustrations of this contingent value arising from adaptability which he says ought to be taken into consideration by the arbitrator, he goes on with these words: "It is quite another case when you come to the second head of objection here, namely, the particular value which the land is to one of the parties before the arbitrator. That is quite another ground. But supposing the general value is only given, if this land was probably certain, within a reasonable time, to be used for certain purposes which would give it a very much enhanced value, that is a matter for the arbitrator to take into consideration. I am clearly of opinion that it is, and that the arbitrator has rightly taken that matter into consideration."

The learned judge then goes to the second head of objection above mentioned and says: "That would be a serious objection to the award, and a fatal one, because, as far as my experience goes, it has been the invariable practice sanctioned by the Courts that arbitrators are not to value the land with reference to the particular purpose for which it is required, particularly where the matter is under parliamentary powers with reference to what the parties who are taking the land under compulsory powers are obliged by their necessities, or what they suppose to be their necessities, to pay for it there—that it is to be excluded from consideration, and the only way it can or ought to be put forward at all is as a possible illustration of the probability of the land being useful for such a purpose. You must not look at the particular purpose which the defendants in the case before the arbitrator are going to put land to when they take it under parliamentary powers or undertakings for any special purpose, but you may possibly use it as an illustration to anticipate or to answer an argument that the schemes thrown out by the plaintiff in this case are going to enhance the value of the land are not visionary, but are schemes with certain probability in them. I do not see any objection to that being used as an argument."

In the present case I do not think that either side take any exception to the law laid down by Grove J. in reference to special

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adaptability being an element which the probability of purchasers requiring the land for such purposes gives to the land compulsorily taken for such purposes. But it is said that the element which the arbitrator may take into consideration is not the fact that the land has in fact been taken, and that the probability has been realized by the promoters having obtained compulsory powers to take the land in question, but only the value of the probability as it existed before the promoters had obtained their powers. And it is said that these values cannot possibly be the same; and, further, that the umpire in the present case, by his answers to the questions sent to him by the Court of Appeal, has plainly shewn that in his judgment the contingent value of the probability and the realized value by reason of the promoters having obtained parliamentary powers to take the land are identical. I think this is so, and that, as on the answers to the questions it appears that the umpire has treated the probability and the realized probability as identical for the purposes of valuation, he has gone on a wrong basis, and that we ought to send the award back to him in order that he may value the possibility of the site going into the market as being required for the enlargement of the waterworks, and not on the basis of a realized possibility, or on account of the promoters having obtained from Parliament compulsory powers. The value of that possibility, as stated by Collins M.R. in *In re Gough and Aspatria, &c., Water Board* (1), is a question entirely for the umpire. It may be that the adaptability of the land for the purpose of enlarging the reservoir was so unique that he will give a value little less than that which he would give if dealing with the realized possibility. But in my judgment he ought to value the possibility and not the realized possibility.

I have only to add that I entirely reject the contention of counsel on behalf of the water board that because the board itself owns a portion of the land essential to the construction of the reservoir, for the construction of which the land compulsorily taken is specially adaptable, and because the board could always have refused to combine with the other owners of land essential

(1) [1904] 1 K. B. 417, at p. 423.

to the construction of the reservoir, therefore the adaptability of Mr. Lucas's land could not be taken into consideration as an element to be considered in compensation. The argument seemed to be that because the water board had obtained powers to construct the reservoir the possibility of a purchaser requiring the land had come to an end.

FLETCHER MOULTON L.J. read the following judgment:—This is an appeal from a decision of Bray J. on an award under the Lands Clauses Consolidation Acts, which, by consent of the parties, was stated in the form of a special case. The question upon which the Court was asked to pronounce related to the quantum of compensation to be given for certain lands, situated near Chesterfield, which the appellants were desirous to acquire for the construction of a reservoir, and powers to acquire which they had obtained under the Chesterfield Gas and Water Board Act, 1904. The respondent, the owner of the lands, claimed, and the umpire has found as a fact, that these lands possessed peculiar natural advantages for a reservoir site when taken in conjunction with certain other lands, part of which belonged to the appellants themselves and part to a third person. The umpire assessed the compensation at a sum of 1615*l.*, but directs in the special case that this is to be reduced by the sum of 779*l.* if the Court should be of opinion that the adaptability of the land for a reservoir was not a fit and proper matter for consideration as an element in the assessment. This was therefore the question which the Court was asked to decide. The learned judge in the Court below supported the award for the larger sum, and the present appeal is brought from that decision.

The principles upon which compensation is assessed when land is taken under compulsory powers are well settled. The owner receives for the lands he gives up their equivalent, i.e., that which they were worth to him in money. His property is therefore not diminished in amount, but to that extent it is compulsorily changed in form. But the equivalent is estimated on the value to him, and not on the value to the purchaser, and hence it has from the first been recognized as an absolute rule

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that this value is to be estimated as it stood before the grant of the compulsory powers. The owner is only to receive compensation based upon the market value of his lands as they stood before the scheme was authorized by which they are put to public uses. Subject to that he is entitled to be paid the full price for his lands, and any and every element of value which they possess must be taken into consideration in so far as they increase the value to him.

At a very early date in the history of this branch of the law there arose what is known as the question of "special adaptability." The phrase is not a happy one, for special adaptability for some purpose or other is the very basis of the market value of all land, except, perhaps, land that in all respects falls below the average. In agricultural land extra fertility, in town lands advantages of site, are true cases of special adaptability for farming or building purposes. These tend so directly to increase both the value and the market price of lands in the hands of a private owner that it has never been doubted that he could urge them in augmentation of the compensation which he was entitled to receive. The question has arisen only in the cases where the special adaptability is for purposes for which lands are required only when used for works of public utility, which are naturally different from the uses to which lands are put while in private hands, and which therefore do not necessarily influence the price which such lands command in the market. Ought the owner to be entitled to higher compensation by reason of the, to him, useless peculiarities which the lands possess? No better example of the problem could be found than that which we have in the present case. The land in question is by its position and conformation marked out as a favourable site for an impounding reservoir to collect water for the public supply of a district. The peculiarities which make it suitable for that purpose add nothing to its value as agricultural or grazing land, which I will assume to be the only alternative uses. A public authority obtains powers to take it for a reservoir; ought it to pay any higher price than is represented by its agricultural or grazing value? Is not any price in excess of this a violation of the canon that you are only to give that which

represents its worth to the seller, and that you are to disregard all questions of its worth to the buyer?

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The decided cases seem to me to have hit upon the correct solution of this problem. To my mind they lay down the principle that where the special value exists only for the particular purchaser who has obtained powers of compulsory purchase it cannot be taken into consideration in fixing the price, because to do otherwise would be to allow the existence of the scheme to enhance the value of the lands to be purchased under it. But when the special value exists also for other possible purchasers, so that there is, so to speak, a market, real though limited, in which that special value goes towards fixing the market price, the owner is entitled to have this element of value taken into consideration, just as he would be entitled to have the fertility or the aspect of a piece of land capable of being used for agricultural purposes. There is nothing strange or abnormal in this. Although a large reservoir is not a need that ordinarily occurs in the experience of individuals, yet it is a recognized and often occurring need in the experience of the community, and in a densely populated country like England it may well happen that some out of the way tract of land suitable by its position and conformation to be formed into a reservoir is capable of being useful in this way to more than one locality, and may thus be the subject of competition between them, and may thus command in the market a corresponding price. In such a case I can see no reason why an owner should not be entitled to have this fact taken into consideration in assessing his compensation. It is a true element of market value. Nor is it in my opinion an answer to say that the purchasers must necessarily be persons possessing parliamentary powers, and that none such exist at the moment except the one that is actually exercising his compulsory powers. In the case of waterworks for public supply promoters must always arm themselves with parliamentary powers, since distribution itself would otherwise be impracticable. But if by its prudence and forethought a public authority had by private negotiation secured a desirable site for a reservoir for the water supply of its own district, it would not be in accordance with the practice of Parliament to

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refuse to it the powers necessary to its effective use for that purpose.

There is, therefore, nothing unreasonable in considering that in certain cases land specially suited for such purposes might fairly become in private hands the subject of competition between rival public authorities desirous of getting the advantage of that special suitability; and, this being so, the tribunal assessing the compensation would be entitled, and bound, to consider what is the fair market value so arising, and, if it be greater than that obtained by taking it as purchased for ordinary uses, to give to the seller the larger of the two. As I read the award of the umpire, he has specifically found as a fact that there exists such a special suitability in the lands in question, and that there also exists such a possible competition in the district in respect of the supply of water as would entitle him to estimate the compensation in the way I have described, and it is not contested that there was evidence on which he could so find. This being so, I should under ordinary circumstances have refused to interfere with the award of the larger sum. But in the present case the award shews on the face of it that the umpire has made a mistake in law which may have, and in my opinion probably has, influenced him in arriving at the sum awarded. I have said that the existence of competition entitles the arbitrator to take special adaptability into account in arriving at the quantum of compensation. But the extent and the imminence of such competition must have an important bearing on the weight to be given to it as affecting the quantum of compensation, and it is plain to me that the umpire has wrongly supposed that in this case at least one other possible competitor existed already equipped with the necessary parliamentary powers for acquiring this site for reservoir purposes, namely, the rural district council. He has arrived at this conclusion by erroneously construing the provisions of s. 40, sub-s. 1, of the Chesterfield Gas and Water Board Act, 1895. The powers thereby given to the rural district council relate only to lands or works situated within its district, and the lands in question are not so situated. I cannot say that such a mistake in the construction of the statute may not have affected the amount of

his award, and if I am to state my personal opinion, I think that it must have affected it. Quantum is a matter entirely for the arbitration tribunal, and we are not competent to remedy the consequences of this error on his part, and accordingly the award must be sent back to him for his reconsideration.

This would suffice for the purposes of our decision, but, seeing that two points of law of general importance and of direct bearing on the case have been fully argued before us, I do not think that we ought to send the case back to the umpire without expressing our opinion on them for his guidance. The first point arises from the fact that the lands in question do not include the whole of the site necessary for the proposed reservoir. Two other pieces of land must go to form the reservoir, and it is argued by the appellants that in such a case no special adaptability exists. They put the argument in the following form: If the lands necessary for a reservoir, which taken as a whole possess special suitability for that purpose, belong to A., B., and C., then no one of these owners can claim in respect of it, because the consent of the other two is needed to enable that special suitability to be utilized, and such consent might not be given. In my opinion this contention is wholly wrong. In actual life people as a rule act in the way which they believe will conduce most to the advancement of their own interests, and owners in such a case would thus not throw away an enhancement of value in which they would all share. In such a case an arbitrator would, in my opinion, be bound to treat the enhancement of value as something to be shared by the component pieces of land in such proportions as he thought their relative importance merited.

A further contention more ingenious than commendable was here raised on behalf of the appellants, based upon the fact that they themselves are one of the part owners. It was said that in such a case the ordinary rule which I have enunciated would not apply, because they would be certain to refuse the consent which it assumes, since by so doing they would destroy the possibility of the land being put to its natural use as a reservoir, and thus enable themselves to get it at a lower price. Seeing that their object in acquiring it is in fact to so use it, such an argument does not reflect very favourably on the principles upon

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which such a public body would act. But there is no foundation for the contention. The most direct answer to it was given by Buckley L.J. in the course of the argument when he pointed out that the ownership of a portion of the land by the appellants themselves rendered it an a fortiori case for the application of the general rule, because not only the consent of the appellants to the use of the land as a reservoir, but the obligation upon them so to use it, was the very basis of the application which they made to Parliament for their statutory powers, so that, so far as they are concerned, the consent that it should be put to that special use was obtained by anticipation. But I am content to rest my judgment upon a more general ground, namely, that the compensation for lands depends upon the nature and circumstances of those lands themselves (taken so far as necessary in connection with the nature and circumstances of other lands to be used with them) and has nothing to do with the personal views or wishes of the individuals who may chance at the moment to be the owners of those lands. If two pieces of land are to be compulsorily taken to form a rifle range, the compensation payable will be the same whether one or both the portions belong to an ardent militarist or to a Quaker who objects to everything of a warlike character.

The second point is raised by the judgment of Bray J. in the Court below. Speaking of the claim of this land to an enhanced price by reason of its situation, he says: "I cannot doubt that land adjoining large works would, in fact, often have a special value, because the owner of the works would be likely to require additional land and would be willing to give a larger price because it adjoined his works, and why should not this land have a special value because, if the board desired to build a new reservoir, this was the most convenient site on which to build it?" There is nothing in this language of which I complain, if it is taken with its proper limitations. It undoubtedly adds to the value of land that a new customer has been introduced who is likely to offer a special price because the land is accommodation land for which he will be willing to pay more than its ordinary market value for purposes and at times not covered by his compulsory powers. But if the land still remains in the position

that there is no competition for it by reason of its special position and adaptability, and that when the compensation has to be assessed there is no one (apart from the one purchaser who has obtained compulsory powers of purchase) to whom the land has a higher value than its value for ordinary purposes, I can see nothing to exclude the operation of the principle that you are to look at the value to the seller and not at the value to the purchaser. The scheme which authorizes the new reservoir only entitles the owner of the land to receive as compensation the value of the land unenhanced by that scheme, and, unless its situation and peculiarities create a market for it as a reservoir site for which other possible bidders exist, I do not think that the single possible purchaser that has obtained parliamentary powers can be made to pay a price based on special suitability merely by reason of the fact that it was easy to foresee that the situation of the land would lead to compulsory powers being some day obtained to purchase it. No element of that which economists term "value in use" can, in my opinion, increase compensation, unless it is either a "value in use" to the seller or a "value in use" to persons other than the proposed purchaser so as to introduce the element of competition as a factor in fixing price.

BUCKLEY L.J. read the following judgment:—The frank cynicism of the argument which the appellants have had the courage to address to the Court has occasioned me surprise. I hope I do not go too far when I say that the argument can only be seriously advanced by a speaker who studiously shuts his eyes to the immorality of its substructure. The appellants admit, and upon authority they cannot deny, that, if there be three persons whose combined properties offer special adaptability for some purpose, each is in compensation under the Act entitled to receive the fair value of his land having regard, amongst other things, to its special adaptability, and that whether it be or be not proved that each of the other owners is prepared to concur in devoting it to that purpose. The appellants admitted as much in the Court below and have admitted it before us. But if one of the three is desirous of buying out the other two, then, if their argument is right, the element of special

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adaptability is removed, because he as one of the three can prevent the user for the special purpose. They contend that where one of the three is in fact desirous of using the land for that special purpose, and has in fact obtained from the Legislature compulsory powers to enable him to do so, he can deprive the other two of the special value arising from the adaptability, and that upon the ground that the special purpose cannot be effectuated without his consent. They say that they went to the Legislature and obtained compulsory powers for a special public purpose, and that in fixing the fair value to be paid for the exercise of their compulsory powers they are entitled to say that the special purpose cannot be carried out, because they do not assent to the land being used for that purpose.

This appears to me to be a suicidal argument. The board here say, We admit that we should have to pay the adaptability value but for the fact that we own part of the site and can prevent the construction of the reservoir, but you must assume that the possibility of the site being wanted for that purpose does not exist because we own part of the site and we do not consent. It is true that in determining the question whether there is a possible market for the site the statutory purchase is not to be considered. For that purpose I must exclude the fact that the board have obtained statutory powers. But it does not follow that for the present purpose I am to assume that the board, who want the land for a purpose, will refuse to carry out that purpose. In *In re Countess Ossalinsky and Manchester Corporation* (1) Grove J. says: "You must not look at the particular purpose which the defendants in the case before the arbitrator are going to put land to when they take it under parliamentary powers or undertakings for any special purpose, but you may possibly use it as an illustration to anticipate or to answer an argument that the schemes thrown out by the plaintiff in this case are going to enhance the value of the land are not visionary, but are schemes with certain probability in them. I do not see any objection to that being used as an argument." It is one thing to say that the statutory power of purchase is to be set out of consideration, in the sense

(1) See ante, note (2), p. 24.

that, to use Vaughan Williams L.J.'s expression, the possibility, and not the realized possibility, is the material factor, and another thing to say that the possibility is converted into an impossibility by the fact that the person who has obtained the statutory power owns part of the site, and that for purposes of compensation he is going to set up that he forbids the very use for which he has obtained statutory power to buy.

Suppose that the intending purchaser were not one of the three owners, but were a fourth party, he would have to pay each of the three owners the adaptability value. But the appellants argue that the value for compulsory purchase varies according as the owner of part of the site is or is not the statutory purchaser for that purpose and varies in favour of the person who obtains the compulsory powers. The argument is that in acquiring compulsorily for the special purpose the owner of part of the site is at liberty to deny that he is going to carry out the purpose. I think the argument quite unsound.

From the judgment of Collins M.R. in *In re Gough and Aspatria, &c. Water Board* (1) I quote the following: "To exclude the element of adaptability it would be necessary, as it seems to me, to shew that there is no reasonable possibility of the site coming into the market. The value of the possibility, if it exists, is a question entirely for the arbitrator."

The facts here are that not only is there a reasonable possibility of the site coming into the market, but that the site is wanted for the particular purpose, and is being acquired under compulsory powers for that purpose. The land is so situate in proximity to the reservoirs already existing that within a reasonable time it is reasonably certain that it will be required for this special purpose, with the result that it has acquired an enhanced value. That was a matter for the umpire to take into consideration. To effectuate that purpose the board must necessarily concur so far as they are owners of part of the site. In this state of things there is nothing to exclude the element of adaptability. The umpire, however (see s. 19 (*b*) of the special case), assumed (as both sides agree, erroneously) that under s. 40 of the Act of

(1) [1904] 1 K. B. at p. 423.

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1895 the rural district council had power to acquire the works of the board. He was thus assuming that there was in existence another possible statutory purchaser. Further, as Vaughan Williams L.J. has pointed out, it is the possibility, and not the realized possibility, of the site being required for the purpose for which it is specially adaptable which ought to be considered. Under these circumstances it may be, although I do not say that it is the case, that the amount at which he has assessed the compensation ought to be varied with reference to these circumstances, and I agree that under these circumstances the matter ought to go back to him.

Award remitted to umpire.

Solicitors for the board: *Stevens, Son & Parkes, for J. Middleton, Chesterfield.*

Solicitors for claimant: *Shipton, Hallewell & Co., Chesterfield.*

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BARNES, APPELLANT *v.* BROWN, RESPONDENT.

Dentist—Unregistered Person—Description—"Specially qualified to practise Dentistry"—Dentists Act, 1878 (41 & 42 *Vict. c.* 33), *s.* 3.

By the Dentists Act, 1878, s. 3, "A person shall not be entitled to take or use the name or title of 'dentist' (either alone or in combination with any other word or words), or of 'dental practitioner,' or any name, title, addition, or description implying that he is registered under this Act or that he is a person specially qualified to practise dentistry, unless he is registered under this Act."

The words in the above section "specially qualified to practise dentistry" are not used in a technical sense as referring only to a qualification conferred by some public body by the grant, for instance, of a diploma or degree, but include special personal qualifications to practise dentistry acquired by study and practice.

The appellant, who was not registered under the Act and was not a legally qualified medical practitioner, carried on a dentist's practice at premises on the inner door and windows of which he exhibited his name and a notice as follows: "H. J. Barnes. Finest artificial teeth at moderate prices. Extractions, Advice free. Hours 10—7. English and American teeth, Advice free. Painless extractions." His room was fitted as a dentist's operating room. The appellant having been

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convicted by a Court of summary jurisdiction of having taken and used a description implying that he was specially qualified to practise dentistry:—

Held, that there was evidence upon which the appellant could be convicted of an offence under s. 3 of the Act.

CASE stated by a metropolitan police magistrate.

The respondent preferred an information against the appellant for that he, the appellant, on March 13, 1908, at 38, High Street, Marylebone, did, not being then registered under the Dentists Act, 1878, and not being then a legally qualified medical practitioner, unlawfully take and use an addition or description—namely, "H. J. Barnes. Finest artificial teeth at moderate prices. Extractions, Advice free. Hours 10—7. English and American teeth, Advice free. Painless extractions"—implying that he was specially qualified to practise dentistry, contrary to s. 3 of the Dentists Act, 1878.

On the hearing of the information the respondent, who was a clerk in the employment of the solicitors to the British Dental Association, was called and proved the following facts:—On March 13 he went to the appellant's address. The appellant's rooms were over a dairy. His name was on the inner door and windows—"H. J. Barnes. Finest artificial teeth at moderate prices. Extractions, Advice free. Hours 10—7. English and American teeth, Advice free. Painless extractions." These notices could all be seen from the street. The respondent went in. The room was fitted as a dentist's operating room with chair engine, &c. He asked for Mr. Barnes and the appellant appeared. He allowed the appellant to burr his tooth a little, and then told him who he was and that he, the appellant, was an unqualified dentist and would be prosecuted. The appellant admitted he carried on a dentist's practice there.

The appellant did not in fact take or use the name or title of "dentist" either alone or otherwise, nor that of "dental practitioner." No question arose and no evidence was given as to the appellant's actual skill.

It was admitted that the appellant was not registered under the statutes in that behalf and that he was not a legally qualified medical practitioner.

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Upon the foregoing facts it was contended on behalf of the respondent that the appellant was taking or using a style, title, addition, or description implying that he was specially qualified to practise dentistry contrary to the provisions of s. 3 of the Dentists Act, 1878 (1), as amended by s. 26 of the Medical Act, 1886. (2) It was further contended on behalf of the respondent that the words "specially qualified to practise dentistry" meant using such words as would imply to any person reading them that any such person seeking advice from the appellant or desiring the appellant to treat his teeth would get the benefit of such skill and treatment as would be given by a qualified or registered dentist: *Royal College of Veterinary Surgeons* v. *Robinson* (3); and that the words used meant that the appellant was holding himself out as having special skill in dentistry.

On behalf of the appellant it was contended that no offence had been committed within the meaning of the Acts or at all, and also that the appellant did not use any name, title, addition, or description implying that he was registered under the Dentists Act, 1878, or that he was a person specially qualified to practise dentistry within the meaning of s. 3 of the Act as amended by s. 26 of the Medical Act, 1886.

The magistrate came to the conclusion that the appellant by the use of the words "English and American teeth, Advice free. Painless extractions," had held himself out as a person of very

(1) The Dentists Act, 1878 (41 & 42 Vict. c. 33), s. 3:

"A person shall not be entitled to take or use the name or title of 'dentist' (either alone or in combination with any other word or words), or of 'dental practitioner,' or any name, title, addition, or description implying that he is registered under this Act or that he is a person specially qualified to practise dentistry, unless he is registered under this Act.

"Any person who, ... not being registered under this Act, takes or uses any such name, title, addition, or description as aforesaid, shall be liable, on summary conviction, to a fine not exceeding twenty pounds; provided that nothing in this section shall apply to legally qualified medical practitioners."

(2) The Medical Act, 1886 (49 & 50 Vict. c. 48), s. 26:

"It is hereby declared that the words 'title, addition, or description,' where used in the Dentists Act, 1878, include any title, addition to a name, designation, or description, whether expressed in words or by letters, or partly in one way and partly in the other . . . ."

(3) [1892] 1 Q. B. 557.

exceptional skill who could extract teeth without pain, and that therefore he had taken and used an addition or description implying that he was a person specially qualified to practise dentistry within the meaning of s. 3 of the Dentists Act, 1878. He accordingly convicted the appellant and ordered him to pay a fine of 20*s.* and 3*l.* 3*s.* costs.

Danckwerts, K.C. (*F. E. Smith, K.C.*, and *H. H. Curtis Bennett* with him), for the appellant. The appellant has not taken or used any addition or description implying that he is "a person specially qualified to practise dentistry" within the meaning of s. 3 of the Dentists Act, 1878. Those words may well mean that the person must hold one of the qualifications specified in the Act so as to entitle him to be registered. It is not necessary, however, in the present case to go so far as that. It is sufficient to say that the words mean that the person must have a qualification which has been recognized by some public body, as, for instance, by the grant of a diploma or degree. There is nothing to prevent a person who is not registered under the Act from practising as a dentist. Sect. 3 of the Act merely prohibits an unregistered person, who is not a legally qualified medical practitioner, from taking or using the name or title of dentist or dental practitioner, or any name, title, addition, or description implying that he is registered under the Act or that he is a person specially qualified to practise dentistry; and s. 5 prevents him from recovering any fee or charge for the performance of any dental operation or for any dental advice, though he may recover the price of materials, such as gold and false teeth, supplied to a patient: *Seymour* v. *Pickett.* (1) Sects. 6 and 10 indicate what are the kind of recognized qualifications which are referred to in the words "specially qualified" in s. 3. These latter words do not mean the mere possession of special skill and knowledge. The special skill and knowledge must be recognized by some public body. Every one who holds himself out as practising dentistry impliedly undertakes to bring to the exercise of his profession a reasonable amount of skill and knowledge. "Specially qualified" must mean more than that. The preamble to the Act, though repealed

(1) [1905] 1 K. B. 715.

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by the Statute Law Revision Act, 1894 (57 & 58 Vict. c. 56), still throws light upon the meaning of the words. It recites that "it is expedient that provision be made for the registration of persons specially qualified to practise as dentists in the United Kingdom," thus connecting the expression "specially qualified" with registration. The word "qualification" in s. 4, sub-ss. 1 (*a*) and 2, and s. 11, sub-s. 2, can only refer to one of the recognized qualifications. These provisions indicate that the words "specially qualified" in s. 3 refer to a qualification recognized by some public body, as, for instance, by the grant of a diploma or degree. This view of the meaning of the words "specially qualified" in s. 3 is strengthened by s. 26 of the Medical Act, 1886 (49 & 50 Vict. c. 48), which declares that "the words 'title, addition, or description,' where used in the Dentists Act, 1878, include any title, addition to a name, designation, or description, whether expressed in words or by letters, or partly in one way and partly in the other." Those words can only refer to a qualification in the nature of a diploma or degree. In *Emslie* v. *Paterson* (1) the Court of Justiciary in Scotland placed this meaning upon the words in s. 3, and in the case of a statute applicable to the United Kingdom uniformity of construction is desirable. In that case Lord Moncreiff said that "the description contemplated by the statute is a description personal to the individual ejusdem generis with the preceding words"; and Lord Trayner said that "what the statute provided against is any one using a name or designation which is descriptive of a registered or qualified practitioner who is not in fact entitled to the designation which the assumed name or description implies." Both those judgments proceed upon the ground that the words "specially qualified" have the meaning contended for on behalf of the appellant. Again, in the Medical Acts, 1858 (21 & 22 Vict. c. 90) and 1886 (49 & 50 Vict. c. 48), the words "qualification" and "qualified" are used in the same sense. The decision in *Panhaus* v. *Brown* (2) is not against the appellant's contention, because one of the descriptions contained the word "registered." Sect. 17 of the Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62), under which *Royal College of Veterinary*

(1) (1897) 24 R. (Just. Cases) 77.

(2) (1904) 68 J. P. 435.

Surgeons v. *Collinson* (1) was decided, contains words much wider than those in s. 3 of the Dentists Act, 1878, and therefore that decision, if relied upon on behalf of the respondent, is of no assistance. If the construction contended for by the respondent prevails, a notification that "teeth are extracted" will come within the section, because it implies that the person of whom it is stated is specially qualified to extract teeth. This would practically prevent a person who was entitled to practise dentistry from saying that he practised it.

Secondly, assuming that the words have the wide meaning contended for by the respondent, the words used here do not imply that the appellant is specially qualified to practise dentistry. The words mainly relied upon by the magistrate are "painless extractions." But those words only mean that a local anæsthetic will be administered before the tooth is extracted. There was no evidence as to how the painless extraction was effected. The words do not constitute a statement of any qualification; they are only a statement as to what some one is prepared to do. Moreover, they do not connect the appellant with the painless extraction. They do not say that he is going to extract teeth. The decision of the magistrate was therefore wrong.

R. W. Turner, for the respondent. The words "specially qualified to practise dentistry" in s. 3 of the Dentists Act, 1878, are not limited to the holding of a qualification recognized by some public body by the grant of a diploma or degree, but are used in the wider sense as meaning that the person is capable of giving skilful advice and treatment. The decisions under s. 17 of the Veterinary Surgeons Act, 1881, are in point. That section deals with the case of an unregistered person taking or using the title of veterinary surgeon or veterinary practitioner, "or any name, title, addition, or description stating that he is a veterinary surgeon, or a practitioner of veterinary surgery or of any branch thereof, or is specially qualified to practise the same." Those words are very similar to the words of s. 3 of the Dentists Act, 1878, except that the latter are even wider. To bring the case within s. 17 of the Veterinary Surgeons Act, 1881, the description must "state" that the person is specially qualified to

(1) [1908] 2 K. B. 248.

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practise veterinary surgery, whereas under s. 3 of the Dentists Act, 1878, it is sufficient if the description "implies" that the person is specially qualified to practise dentistry. In *Royal College of Veterinary Surgeons* v. *Robinson* (1) this Court held that an unqualified person, who described his place of business as a "veterinary forge," brought himself within s. 17 of the Veterinary Surgeons Act, 1881, Wills J. expressly saying that the word "qualified" was used in its popular and not in its technical signification. The later case of *Royal College of Veterinary Surgeons* v. *Collinson* (2) was also decided upon the same section, and it was there held that the words "canine specialist, dogs and cats treated for all diseases," constituted a description stating that the person to whom they applied was specially qualified to practise a branch of veterinary surgery. Those cases shew that the same words in the Veterinary Surgeons Act, 1881, "specially qualified to practise," are not used in the technical sense as implying the possession of a diploma or degree. If the contention of the appellant were correct, an unregistered person who exhibited on his place of business a notice, in the very words of s. 3 of the Dentists Act, 1878, that he was "specially qualified to practise dentistry" would not come within the prohibition of the section. The decision in *Panhaus* v. *Brown* (3) is directly in point. [He also referred to the preamble and s. 48 of the Medical Act, 1858 (21 & 22 Vict. c. 90).]

That being the meaning of the words "specially qualified to practise dentistry," there was evidence here upon which the magistrate was entitled to come to the conclusion of fact that the appellant, by describing himself as he did, held himself out as being a person who was skilled in the practice of dentistry and who gave skilled advice and treatment, and was therefore specially qualified to practise dentistry.

Danckwerts, *K.C.*, replied.

LORD ALVERSTONE C.J. In my opinion this appeal must be dismissed. Two questions are raised, the first being an important

(1) [1892] 1 Q. B. 557. (2) [1908] 2 K. B. 248.
(3) 68 J. P. 435.

question of law and the other a question of fact. The appellant was charged under s. 3 of the Dentists Act, 1878, with having taken and used a certain addition or description implying that he was specially qualified to practise dentistry. The main contention urged on behalf of the appellant is that the words "specially qualified" mean the possession of a recognized qualification conferred by some public body, as, for instance, one of the special qualifications mentioned in the Act, and that they do not include the mere personal qualifications of the individual, such as his skill and experience as a practitioner. The second question is whether or not the description which the appellant has put forward of himself brings him within the prohibition of the statute.

With regard to the first question it seems to me that, after considering the Act itself and deriving assistance to a certain extent from an Act relating to a kindred matter containing very similar words, the expression "specially qualified" is not intended to be read in the limited sense contended for on behalf of the appellant. Sect. 3 of the Dentists Act, 1878, enacts that "a person shall not be entitled to take or use the name or title of 'dentist' (either alone or in combination with any other word or words), or of 'dental practitioner,' or any name, title, addition, or description implying that he is registered under this Act, or that he is a person specially qualified"—not to be registered, but—"to practise dentistry, unless he is registered under this Act." It is not unimportant to observe that the section uses the word "implying," which is a somewhat wider word than that used in s. 17 of the Veterinary Surgeons Act, 1881, to which I shall have to refer presently. In my opinion the words "specially qualified to practise dentistry" include the personal qualifications of the particular individual to practise dentistry which he has acquired by study and practice. We were very properly pressed with the provisions of s. 26 of the Medical Act, 1886, in support of the view put forward on behalf of the appellant. That section says that "the words 'title, addition, or description,' where used in the Dentists Act, 1878, include any title, addition to a name, designation, or description, whether expressed in words or by letters, or partly in one way and partly

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in the other." It is only necessary to point out that that is a section which merely says that the words are to "include" a description, whether expressed in words or in letters. It does not purport to narrow the meaning of the words, and it is only inserted for the purpose of making it an offence, or making it clear that it is an offence, to use the initial letters as distinguished from the full words of a qualification. I therefore come to the conclusion upon the statute itself that the words "a person specially qualified to practise dentistry" include the case of a person having special personal qualifications to practise dentistry, and are not confined to the possession of a hall-mark or special qualification such as one of those mentioned in the Act.

That being my view of the construction of s. 3 of the Act, it is important to notice that the case is not devoid of authority. Sect. 17 of the Veterinary Surgeons Act, 1881, contains words which are very similar to those in s. 3 of the Dentists Act, 1878. That section enacts that "if any person, other than a person who for the time being is on the register of veterinary surgeons, or who at the time of the passing of this Act held the veterinary certificate of the Highland and Agricultural Society of Scotland, takes or uses the title of veterinary surgeon or veterinary practitioner, or any name, title, addition, or description stating that he is a veterinary surgeon or a practitioner of veterinary surgery or of any branch thereof, or is specially qualified to practise the same," he shall be liable to a penalty. For the purpose of considering the meaning of the words "specially qualified" there is no distinction between the two Acts, except that the one Act uses the word "implying" and the other the word "stating." In *Royal College of Veterinary Surgeons* v. *Robinson* (1) the point was raised that the words "specially qualified" had this limited meaning. That case was decided by a Court consisting of Hawkins and Wills JJ. While it seems to me to be implied in the judgment of Hawkins J., it is distinctly stated in the judgment of Wills J. that the word "qualified" is used in the section in its popular and not in its technical signification. Therefore we have as far back as 1892 a decision that the limited meaning contended for ought not to

(1) [1892] 1 Q. B. 557.

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be placed upon the words. In *Panhaus* v. *Brown* (1)—a decision to which Wills J. was a party—the point was clearly assumed, and this Court applied the principle, that the words included personal qualifications to practise dentistry, and upheld a conviction under s. 3 of the Dentists Act, 1878, in respect of a description which was open to the same kind of argument as that which has been put forward in the present case. Sect. 17 of the Veterinary Surgeons Act, 1881, again came up for consideration in *Royal College of Veterinary Surgeons* v. *Collinson* (2) before this Court, and in that case I expressed the opinion that the words "specially qualified" were used in the wider sense indicated above, and not in the limited sense, and that the description "canine specialist, dogs and cats treated for all diseases," came within those words. My brothers Ridley and Darling agreed with that view, though with some doubt and hesitation. I therefore come to the conclusion that the English authorities shew that the words "specially qualified" are not to be construed in the narrow way contended for on behalf of the appellant.

It is said, however, that the case of *Emslie* v. *Paterson* (3), in the Court of Justiciary in Scotland, is an authority in favour of the appellant's contention. I cannot take that view. That was a case under s. 3 of the Dentists Act, 1878, and the words which were there the ultimate subject of the decision were "American dentistry, A. Emslie," and "dental office." There were two other charges which the sheriff-substitute ruled to be irrelevant, and therefore the case only came before the Court of Justiciary upon the words given above. On looking carefully at the judgments delivered by the learned judges they do not, in my opinion, support the appellant's contention as to the limited meaning of the words "specially qualified to practise dentistry." Lord Moncreiff says: "I agree that the description contemplated by the statute is a description personal to the individual ejusdem generis with the preceding words, and indicating his special qualifications for the work by training and practice." That is to say, not by any of the recognized qualifications such as those specified in the Act, but by "training and practice." Lord

(1) 68 J. P. 435. (2) [1908] 2 K. B. 248.
(3) 24 R. (Just. Cases) 77.

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Trayner says: "What the statute provided against is any one using a name or designation which is descriptive of a registered or qualified practitioner, who is not in fact entitled to the designation which the assumed name or description implies. Here the appellant has assumed no title whatever. He does not call himself a dentist, dental practitioner, dental surgeon, or licentiate in dental surgery. If he did so, he would contravene the statute. But he has added nothing to his own name (which I think is the thing the statute prohibits) by way of title, addition, or description implying that he is registered as a dentist, or that he possesses or claims to have any special qualification for the performance of dental operations." I understand these last words to mean a special personal qualification to practise dentistry. The Lord Justice Clerk says: "I cannot find in these words anything which implies 'special' qualification. If the appellant can without any breach of the criminal law extract teeth and put in false teeth, or the like, I can see nothing in the statute forbidding him from announcing that he does so, which is just announcing that he practises dentistry. The Act strikes at his asserting that he has 'special' qualification for doing so, and whatever that may mean, I am unable to hold that the use of the words 'American dentistry' in connection with his name, or calling his place of business a 'dental office,' can be held to be taking or using a name or title, addition, or description implying that he has a 'special' qualification, as distinguished from an assertion that he is qualified." All the learned judges used the words "special qualification" in the sense I have indicated as describing a personal qualification to practise dentistry. For these reasons, in my opinion, we must hold that the words "specially qualified" do not bear the limited meaning which we are asked to place upon them, but include special personal qualifications to practise dentistry.

There remains the second question, as to which I feel some doubt, but I am unable to come to the conclusion that the magistrate's decision was wrong. It is said that the words, looked at fairly, ought not to be held to describe personal qualifications. The words begin thus: "H. J. Barnes. Finest artificial teeth at moderate prices." So far those words, taken

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by themselves, might mean that the appellant was only carrying on the business of selling artificial teeth, and that he did not profess to carry on the business of a dentist, and, if so, they would not indicate that the appellant had any special personal qualifications to practise dentistry. But there follow the words "Extractions, Advice free. Hours 10—7. English and American teeth, Advice free. Painless extractions." If the real case had been that the appellant was only selling teeth, and was not carrying on the business of a dentist, it might perhaps have been said that the words were ambiguous, and that they ought not to have a construction placed upon them which was inconsistent with what he was doing. But here the respondent went to the appellant's room and had his tooth burred by him. Therefore it is impossible to say that the appellant did not in fact profess to carry on the business of a dentist. What is the inference to be drawn from those words? The magistrate read them as indicating that the appellant had special qualifications which enabled him to extract teeth without pain. The words, in my opinion, are capable of bearing that construction. Personally I think that, if I had been in the learned magistrate's place, I should have desired to know more about the business which the appellant was actually carrying on, because it might, to a certain extent, indicate the meaning of the announcement as to the business which he was carrying on. But however that may be, the conclusion arrived at by the magistrate was one which was open to him, that the words amounted to a statement that the appellant had special qualifications to extract teeth, and, that being so, there was evidence of an offence against the Act. The appeal must therefore be dismissed.

BIGHAM J. I am of the same opinion. I think that the expression "specially qualified" in s. 3 of the Dentists Act, 1878, covers the case of a person who by study and practice in his profession has acquired a knowledge and skill not possessed by ordinary persons. The expression is not used in any narrow or technical sense, but in the popular sense of a person experienced in the work. In my opinion the words in the

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present case are intended to convey and do convey the meaning that the appellant is so qualified. First of all there is his name, which governs the whole announcement and connects him with what follows. Then there comes the statement that he extracts teeth, that he gives advice free, and that he effects painless extractions. I confess that I do not feel the difficulty which my Lord feels. It seems to me to be impossible to say that this is not a description within the meaning of s. 3 implying that the appellant is a person specially qualified to practise dentistry.

WALTON J. I agree.

Appeal dismissed.

Solicitor for appellant: *Percy J. H. Robinson.*
Solicitors for respondent: *Bowman & Curtis Hayward.*

W. F. B.

C. A.

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Oct. 20.

[IN THE COURT OF APPEAL.]

WHITE AND ANOTHER *v.* BUTT.

Practice—Security for Costs—Action by Trustees for Wife under Separation Deed—"Nominal Plaintiff."

Where trustees, to whom, by a covenant in a separation deed, a husband had covenanted to pay an annuity in trust for his wife, sued for arrears under that covenant:—

Held, that the plaintiffs were not mere "nominal plaintiffs" within the rule as to giving security for costs, and, therefore, an order for security for costs could not be made against them on the ground that they were, if unsuccessful, without means of paying costs.

Greener v. *E. Kahn & Co.*, [1906] 2 K. B. 374, discussed.

APPEAL from an order made by Eve J., at chambers, dismissing an appeal from the order of a Master as after mentioned.

The action was brought by the trustees of a separation deed dated November 18, 1880, and made between the defendant of the first part, his wife of the second part, and certain trustees of the third part, upon a covenant in the deed, by which the defendant covenanted with the trustees during the joint lives of himself and his wife to pay to the said trustees an annual sum of 104*l.*

by equal quarterly payments, in trust for the wife for her separate use, but without power of anticipation, to recover a sum of 621*l.* 10*s.* as arrears of the annuity so covenanted to be paid.

The plaintiffs were not the original trustees under the deed, but new trustees who had been appointed in place of those trustees, and to whom as such trustees the benefit of the before-mentioned covenant was assigned by deed, of which assignment notice in writing had been duly given to the defendant. The defendant applied at chambers for an order that the plaintiffs should give security for the costs of the action on the ground that they were mere nominal plaintiffs, having no beneficial interest in the subject-matter of the litigation, and were without means of paying costs, if unsuccessful. The Master refused the defendant's application, and on appeal the judge affirmed his decision.

R. H. Roope Reeve, for the defendant. The principle with regard to security for costs, as laid down by the Court of Appeal in *Greener* v. *E. Kahn & Co.* (1), is that, where a person is suing as a mere trustee for another, who is the person beneficially interested in the cause of action, and the person so suing is without means of paying costs, security for costs will be ordered to be given. The only exception from that rule established by the authorities is in the case of a person, such as a trustee in bankruptcy or a liquidator, who is by statute charged with the duty of realizing the assets of a bankrupt or of a company in liquidation, as the case may be. The plaintiffs in this case are "nominal plaintiffs" within the rule as laid down in *Greener* v. *E. Kahn & Co.* (1)

A. àBeckett Terrell, for the plaintiffs, was not called upon to argue.

VAUGHAN WILLIAMS L.J. In my opinion this appeal must be dismissed. It cannot, I think, rightly be contended that the judgment of Collins M.R. in the case of *Greener* v. *E. Kahn & Co.* (1) established any new principle. He was there only dealing with the application, in a particular case, of a principle

(1) [1906] 2 K. B. 374.

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which had been established a long time previously; and, although one or two of the expressions used by him in that case, which have been relied upon by the counsel for the defendant, might, if taken by themselves, seem to extend the terms of the rule as laid down in the older cases, in my judgment he did not really intend to do anything of the kind. In giving judgment in that case he referred, for a statement of the principle applicable in such cases, to *Cowell* v. *Taylor* (1), where Bowen L.J. stated that the principle was clearly laid down by Bovill C.J. in the case of *Sykes* v. *Sykes*. (2) The passage from the judgment of Bovill C.J. cited by Bowen L.J. is as follows: "To entitle a defendant to security, he must shew not only that the plaintiff is insolvent, but also that he is suing as a nominal plaintiff, in the sense of another person being beneficially interested in the result of the action. In that case, the Court would stay the proceedings until security is given. That doctrine, however, has never been applied to the case of an executor or the assignee of a bankrupt." It was argued before us that, wherever a plaintiff is not beneficially interested personally in the result of the action, he comes within the meaning of the expression "nominal plaintiff," as used in that passage. That this is not so plainly appears, I think, from the judgment of Bowen L.J. in the same case of *Cowell* v. *Taylor* (3) referred to by Collins M.R. in *Greener* v. *E. Kahn & Co.* (4) The learned Lord Justice, in dealing with the exceptions from the rule that poverty is no bar to a litigant, there said, after referring to a head of exception which has no relation to the present case: "There is also an exception introduced in order to prevent abuse"—that is abuse of the rule as to poverty being no bar to a litigant—"that, if an insolvent sues as nominal plaintiff for the benefit of somebody else, he must give security. In that case the nominal plaintiff is a mere shadow. The two most familiar classes of cases of this kind are cases where a person has divested himself of his interest and handed it over to some one else that the transferee may sue for him, and cases where a person who has commenced a suit divests himself of his interest during the course of the suit in order that another

(1) (1885) 31 Ch. D. 34, at p. 39.
(2) (1869) L. R. 4 C. P. 645.
(3) 31 Ch. D. 34, at p. 38.
(4) [1906] 2 K. B. 374.

person may carry it on for his benefit. Those are the common cases. I do not say that there may not be others. In those cases Courts of common law required security for costs to be given." He there indicates the kind of case in which, in order to prevent abuse, the Court will order a plaintiff to give security. It is obvious that the present case is not really analogous to either of the classes of cases which he there described. This is not a case in which the wife, who is here the person beneficially interested in the alleged cause of action, having been the legal owner of it, and capable of suing upon it herself, has, instead of doing so, assigned it to some impecunious person in order that he might sue for her benefit; nor is it like a case in which a person, having commenced an action, has divested himself of his interest during the course of the suit with the same object. After using the expressions which I have cited, the learned Lord Justice proceeded to refer to the early cases on the subject, namely, *Perkins* v. *Adcock* (1), *Elliot* v. *Kendrick* (2), and *Goatley* v. *Emmott*. (3) I have looked at those cases, and they are all cases in which, there having been an assignment of a debt by a person entitled to payment of it to somebody else, the plaintiff, who was suing, was not suing for his own benefit, and was insolvent. That, I think, is the kind of case in which the expression "nominal plaintiff," as used by Bovill C.J. and Bowen L.J. in the cases to which I have referred, is applicable. In my opinion trustees of an ordinary settlement, or trustees under a separation deed such as the plaintiffs in this case, are not within the meaning of that expression. I do not think it necessary to go through the cases on the subject at length; I only wish in conclusion to quote a passage from the judgment of Cozens-Hardy L.J., as he then was, in the before-mentioned case of *Greener* v. *E. Kahn & Co.* (4), which also appears to me to indicate the principle on which security for costs is ordered, and which is as follows: "There is a general principle founded on good sense that, where one person entrusts another with a mandate to collect and distribute the debts of the former, and the person so entrusted is an insolvent, he may be called on to give security for the

(1) (1845) 14 M. & W. 808.
(2) (1840) 12 A. & E. 597.
(3) (1854) 15 C. B. 291.
(4) [1906] 2 K. B. 374, at p. 378.

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costs of any action that he may bring in order to collect any of the debts. The plaintiff who is suing in this action is a person to whom such a mandate has been given, in the first place by Goldberg, the assignor, who confesses thereby that he is impecunious, and in the second place it may be said that there is a mandate from the creditors of the assignor who take the benefit of the deed. Whichever way the case is looked at there is property vested in the plaintiff, not for his own benefit, but for the benefit of others. Why, if the plaintiff is shewn to be insolvent, as he certainly is, should he not give security?" He then cites the statement of the rule by Bovill C.J. in *Sykes* v. *Sykes* (1) and refers to the exception in favour of a trustee in bankruptcy, and says that the same exception is applicable to the cases of an executor and of a liquidator. The only cases I can find at all like the present, in which security for costs has been ordered, are cases in which a married woman was suing by a next friend who was insolvent. But it will be observed that the proposition applicable to such cases is nothing like the proposition contended for by the defendant in the present case, which would cover the case of any trustees, such as those under an ordinary marriage settlement. Such trustees are not appointed in reference to any litigation or in reference to the recovery by action of a debt or other property the beneficial ownership of which is vested in some one else. The next friend is appointed ad hoc, for the purposes of the particular litigation in which the married woman is beneficially interested. For these reasons I think the appeal fails.

BUCKLEY L.J. The plaintiffs' case is that, by a covenant contained in a separation deed dated November 18, 1880, the defendant, the husband, covenanted to pay to trustees during the joint lives of himself and his wife an annual sum of 104*l*., no doubt for the maintenance of the wife; that the wife is still living; and that there is due from the defendant for arrears under the covenant a sum of 621*l*. 10*s*., for which sum the plaintiffs, who are new trustees of the deed appointed in 1907, have brought their action. I am startled by the contention set up by the defendant that

(1) L. R. 4 C. P. 645.

trustees so suing can be called "nominal plaintiffs." They are the only possible plaintiffs, being the persons with whom derivatively the covenant is entered into, and who alone can sue upon it for the arrears in question. It is a rule that a plaintiff cannot in a Court of first instance be called on to give security for costs merely because he is poor, it being deemed right and expedient that a Court of justice should be open to every one. An exception, however, from that rule is that, if a plaintiff is what has been called a "nominal plaintiff" or what, by way of alternative expression, I will call a "fictitious plaintiff," and is without means, security for costs will be ordered. An example of the kind of case in which that expression "nominal plaintiff" is applicable is where a person in whom a cause of action was vested, not being minded to bring an action himself, has assigned that cause of action to another, whom he puts forward for the purpose of suing, but who has no beneficial interest in the subject-matter of the litigation. There are obvious reasons why in the case of a person so put forward to sue in respect of a cause of action in which he is not really interested, and who, being a pauper, is substituted for the person really interested, in order to protect the latter from liability for costs, there should be an order for security for costs. Cases of this kind are what Bowen L.J. clearly had in his mind when giving judgment in *Cowell* v. *Taylor*. (1) He thus describes the kind of case in which an order for security for costs would be made, though not putting that description forward as being absolutely exhaustive: "The two most familiar classes of cases of this kind are cases where a person has divested himself of his interest, and handed it over to some one else that the transferee may sue for him, and cases where a person who has commenced a suit divests himself of his interest during the course of the suit in order that another person may carry it on for his benefit." Then he cited three cases which are all cases of a similar kind to those which he had been describing, namely, cases in which there had been an assignment of a cause of action, and a person was being put forward to sue who was not beneficially interested in the subject-matter of

(1) 31 Ch. D. 34, at p. 38.

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the litigation. That is the class of case in which a plaintiff has been spoken of as a "nominal plaintiff." When a plaintiff is in that sense a nominal plaintiff and is insolvent, no doubt security for costs ought to be ordered. But I fail to see any resemblance between such cases and the present. Here there was no assignment of a debt to a person who had no beneficial interest in it, in order that he might sue for the benefit of the assignor. The appointment of new trustees clearly could not be regarded as such an assignment. This case has no analogy to one in which a person has substituted some one else for himself as legal owner of a debt in order that the transferee may sue for the benefit of the transferor. As I have said, I am startled that any one should put forward the proposition that trustees, like the plaintiffs, come within the rule as to "nominal plaintiffs," because they have no beneficial interest in the subject-matter of the litigation. If this proposition were true, it would apply equally to any trustees, whether of a marriage settlement or a will, or for debenture-holders, and it would follow that trustees could be ordered, if impecunious, to give security for costs in any action brought by them as trustees, on the ground that they, personally, had no beneficial interest in the subject-matter of the action. Such a proposition appears to me altogether untenable. I am therefore of opinion that the appeal must be dismissed.

KENNEDY L.J. I agree and have nothing to add.

Appeal dismissed.

Solicitor for plaintiffs: *E. G. Van Tromp.*
Solicitors for defendant: *Stileman & Neate.*

E. L.

WILLINGALE *v.* NORRIS.

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Oct. 20.

Hackney Carriage—Breach by Driver of Regulations for enforcing Order at Standings—Offence against Statute—Incorporation of Statute—Effect of Repeal of Section—London Hackney Carriages Act, 1843 (6 & 7 *Vict. c.* 86), *s.* 29—*London Hackney Carriages Act*, 1850 (13 & 14 *Vict. c.* 7), *ss.* 4, 8—*London Hackney Carriage Act*, 1853 (16 & 17 *Vict. c.* 33), *s.* 19—*Statute Law Revision Act*, 1874 (*No.* 2) (37 & 38 *Vict. c.* 96), *s.* 1; *Schedule.*

Where a statute gives power to an authority to make regulations, a breach of the regulations so made is an offence against the provisions of the statute.

A breach of regulations made under s. 4 of the Hackney Carriages Act, 1850, for enforcing order at standings for hackney carriages, is subject to the penalty of 40*s.* provided by s. 19 of the Hackney Carriage Act, 1853, for offences against that Act; inasmuch as the effect of s. 21 of the Act of 1853, which provides that the Acts of 1850 and 1853 are to be construed as one Act, is that s. 4 of the Act of 1850 has the same operation as if it were in fact contained in the Act of 1853, and therefore an offence against regulations made under s. 4 of the Act of 1850 is an offence against the Act of 1853.

Quære, whether the effect of s. 8 of the Hackney Carriages Act, 1850, which provides that that Act is to be construed as one Act with the Hackney Carriages Act, 1843, is to make the penalty provided by s. 29 of the Act of 1843 for disobedience by the driver of a hackney carriage of regulations made under that section applicable to a breach by him of regulations of a different kind made by virtue of s. 4 of the Act of 1850, which imposes no penalty for a breach thereof.

Semble, the Statute Law Revision Act, 1874, which partially repeals s. 29 of the London Hackney Carriages Act, 1843, does not, so far as the London Hackney Carriages Act, 1850, is concerned, affect the operation of s. 29 of the Act of 1843.

Case stated by a metropolitan magistrate.

An information was laid by the appellant, Frank Willingale, a metropolitan police constable, against the respondent, Thomas Norris, a motor cab driver, charging the respondent for that he on May 1, 1908, at about 7.10 p.m., at Hyde Park Corner, within the metropolitan police district, did wilfully disregard the regulation of the Commissioner of Metropolitan Police for drivers of motor cabs at a duly appointed standing, in that he, being the driver of the first motor cab upon a certain standing at Knightsbridge, was not with his cab and ready to be hired by any person.

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On April 8, 1908, the Commissioner of Police of the Metropolis made and duly published in the *London Gazette* of April 10, 1908, certain regulations to be observed by drivers of motor cabs at certain standings duly appointed throughout the metropolis. The first and only material one was as follows: "The drivers of the first two motor cabs must be with their cabs and be ready to be hired at once by any person." These regulations were, in the opinion of the magistrate, legally and properly made and duly published under and by virtue of the provisions of s. 4 of the London Hackney Carriages Act, 1850 (13 & 14 Vict. c. 7) (1),

(1) London Hackney Carriages Act, 1843, s. 2: "The words hereinafter mentioned, which in their usual signification have a more confined or different meaning, shall in this Act (except where the nature of the provisions or the context of the Act shall exclude such construction), be interpreted as follows; (that is to say,) the words 'hackney carriage' shall include every carriage (except a stage carriage) which shall stand on hire or ply for a passenger for hire at any place within the limits of the city of London and the liberties thereof, and metropolitan police district; and the words 'metropolitan stage carriage' shall include every stage carriage except such as shall on every journey go to or come from some town or place beyond the limits aforesaid."

Sect. 29: "It shall be lawful for the commissioners of police of the metropolis from time to time to appoint standings for hackney carriages at such places as they shall think convenient within the metropolitan police district, except the borough of Southwark, and at their discretion to alter the same, and from time to time to make regulation concerning the boundaries of the same, and the number of carriages to be allowed at any such standing, and also to make regulations for enforcing order at the places at which metropolitan stage carriages shall call or ply for passengers, and for fixing the time during which each such carriage shall be allowed to remain at any such place; and every driver of a hackney carriage, and also every driver or conductor of a metropolitan stage carriage, who shall wilfully disregard or not conform himself to such regulations, shall for every such offence forfeit the sum of forty shillings."

London Hackney Carriages Act, 1850, s. 4: "And be it enacted, that it shall be lawful for the said commissioners of police (of the metropolis) from time to time to appoint standings for hackney carriages at such places as they shall think convenient in any street, thoroughfare, or place of public resort within the metropolitan police district, any law, statute, or custom to the contrary thereof notwithstanding, and at their discretion to alter the same, and from time to time to make regulations concerning the boundaries of the same, and the number of carriages to be allowed at any such standing, and the times at and during which they may stand and ply for hire at any such standing, and also from time to time to

which section, however, does not provide any penalty for a breach of regulations so made.

On behalf of the appellant it was submitted that by s. 8 of the Act of 1850 that Act is to be construed as one with the London Hackney Carriages Act, 1843, and that all the provisions of that Act, except so far as were otherwise provided in the Act of 1850,

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make such regulations as the said commissioners shall deem proper for enforcing order at every such standing, and for removing any person who shall unnecessarily loiter or remain at or about any such standing; and the said commissioners shall cause all the orders and regulations to be made by them as aforesaid to be advertised in the *London Gazette*, and a copy thereof, signed by one of the said commissioners, to be hung up for public inspection in the office of the commissioners of police in the city of Westminster and at each of the police courts, and such copy shall be received in evidence in the said courts as if it were the original of which it purports to be a copy, and shall be taken to be a true copy of such original order or regulation, without further proof than the signature of the said commissioner."

Sect. 8: "This Act shall be construed as one Act with the said Act passed in the seventh year of the reign of Her Majesty Queen Victoria, intituled 'An Act for regulating Hackney and Stage Carriages in and near London,' and all the provisions of the said Act, except so far as is herein otherwise provided, shall extend to this Act, and to all things done in execution of this Act."

London Hackney Carriage Act, 1853, s. 19: "For every offence against the provisions of this Act for which no special penalty is hereinbefore appointed, the offender shall be liable to a penalty not exceeding forty shillings, or in default of payment be imprisoned for any time not exceeding one month in any gaol or house of correction within the jurisdiction of the magistrate before whom the conviction shall take place."

Sect. 21: "This Act shall be construed as one Act with the Act passed in the seventh year of the reign of Her Majesty Queen Victoria, chapter eighty-six, and the Act passed in the thirteenth year of the reign of Her Majesty, chapter seven; and all the provisions of the said Acts, except so far as is herein otherwise provided, shall extend to this Act, and to all things done in execution of this Act."

Statute Law Revision Act, 1874 (No. 2), s. 1: "The enactments described in the schedule to this Act are hereby repealed, subject to the exceptions and qualifications in the schedule mentioned:

"Provided, that . . . . the repeal by this Act of any enactment shall not affect any enactment in which such enactment has been applied, incorporated, or referred to . . . ."

"SCHEDULE.

"6 & 7 Vict. c. 86: Section twenty-nine from 'to appoint' to 'standing, and also,' and from 'every' to 'also,'"

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were to extend to the Act of 1850 and to all things done in execution of it. The magistrate was also referred to s. 29 of the Hackney Carriages Act, 1843, which gives the Commissioner of Police power to make regulations for enforcing order at places at which metropolitan stage carriages call or ply for passengers, and provides that every driver or conductor of a metropolitan stage carriage wilfully disregarding or failing to conform to such regulations shall for every offence forfeit the sum of 40*s*. This section gives no power to the Commissioner of Police to make regulations for enforcing order at hackney carriage stands.

On behalf of the appellant it was further submitted that s. 4 of the Act of 1850 was specially passed to remedy this omission, and that, having regard to the provision of s. 8 of the Act of 1850 to the effect that that Act and the Act of 1843 were to be read together, the penalty attaching under s. 29 of the Act of 1843 to a breach of any regulations made under that section also attached to a breach of any regulation made under s. 4 of the Act of 1850. The magistrate, however, held that this was not so, and that the penalty provided for a breach of the regulations made under s. 29 of the Act of 1843 could only be regarded as relating to any regulations in fact made under that section and dealing with stage carriages.

The attention of the magistrate was also drawn on behalf of the appellant to the London Hackney Carriage Act, 1853, s. 19, which provides that "for every offence against the provisions of this Act for which no special penalty is hereinbefore appointed" the offender shall be liable to a penalty not exceeding 40*s*. Sect. 21 of the Act of 1853 provides that that Act shall be construed as one with the before-mentioned Acts of 1843 and 1850, and that all the provisions of the two last-mentioned Acts, except as far as is otherwise provided, shall extend to the Act of 1853 and to all things done in the execution of it. It was submitted on the appellant's behalf that, reading these three statutes together, a breach of a regulation made under s. 4 of the Act of 1850 was an offence within the meaning of s. 19 of the Act of 1853, and that a penalty not exceeding 40*s*. should therefore be imposed. The magistrate held that this was not so, and that the provision of s. 19 of the Act of 1853 only related to

offences which were directly contrary to that Act. He accordingly (without deciding on the merits as to whether the respondent had been guilty of a breach of the regulations as charged) dismissed the summons on the ground that he had no power to inflict a penalty.

The question for the opinion of the Court was whether the magistrate was right in law.

A. H. Bodkin, for the appellant. Until the year 1850 the office of registrar of metropolitan public carriages was in existence. In that year the office was abolished by s. 2 of the Hackney Carriages Act, 1850, and all its powers were transferred to the Metropolitan Commissioners of Police. Until the passing of the Hackney Carriages Act, 1850, certain regulations could be made under the Hackney Carriages Act, 1843, s. 29, with a penalty of 40*s.* for wilfully disregarding them, but not including regulations for enforcing order at hackney carriage stands. By s. 4 of the Hackney Carriages Act, 1850, the widest powers to make regulations were given to the Commissioners of Police, including regulations for enforcing order at hackney carriage standings, the section, however, containing no provision for a penalty for a breach of the regulations. The provision of a penalty was unnecessary, inasmuch as s. 8 of the Act of 1850 provides that the Acts of 1843 and 1850 are to be read as one Act. The result is that s. 8 of the London Hackney Carriages Act, 1850, attracts the provisions of s. 29 of the London Hackney Carriages Act, 1843. Therefore the penalty imposed by s. 29 of the Act of 1843 applies to a breach of the regulations made under s. 4 of the Act of 1850.

The Statute Law Revision Act, 1874 (No. 2), repealed that portion of s. 29 of the London Hackney Carriages Act, 1843, which relates to hackney carriages, but by s. 1 of the Act of 1874 the repeal by that Act "of any enactment shall not affect any enactment in which such enactment has been applied, incorporated, or referred to." Therefore so far as the London Hackney Carriages Act, 1850, is concerned s. 29 of the Act of 1843 is unrepealed.

Further, by s. 19 of the London Hackney Carriage Act,

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1853, for any offence against the provisions of that Act for which no special penalty is in that Act appointed the offender is liable to a penalty of 40*s*., and as by s. 21 of the Act of 1853 that Act is to be construed as one Act with the Acts of 1843 and 1850, the penalty of 40*s*. applies to a breach of regulations made under the Act of 1850. The rule of construction which is to be applied where two statutes are to be read as one was laid down in *Canada Southern Ry. Co.* v. *International Bridge Co.* (1) [Sects. 12, 14, 15, 16, and 20 of the London Hackney Carriage Act, 1853, were also referred to.]

H. D. Roome (*Curtis Bennett* with him), for the respondent. The penalty imposed by s. 29 of the Act of 1843 has no application to the enforcement of order at a hackney carriage stand. It only relates to breaches of regulations made under that section with regard to stage carriages. The penalty therefore does not apply to regulations of a different kind, namely, for the enforcement of order at hackney carriage stands made under s. 4 of the London Hackney Carriages Act, 1850. Further, s. 29 of the Act of 1843 is repealed by the schedule to the Statute Law Revision Act, 1874. Sect. 19 of the Hackney Carriage Act, 1853, only relates to offences directly contrary to that statute. It is a penal section and must be construed strictly and not extended to supplying a defect in s. 4 of the Act of 1850. The intention of the Legislature was that each statute should be complete in itself. The penalty imposed by s. 19 of the Act of 1853 only applies to offences against the Act of 1853 itself for which no penalty is expressly provided by that Act.

LORD ALVERSTONE C.J. This case raises a question of considerable importance and of general application. The respondent was summoned for breach of a regulation made under s. 4 of the London Hackney Carriages Act, 1850. That was one of a series of statutes enacted to control and regulate London hackney and stage carriages. Sect. 29 of the London Hackney Carriages Act, 1843, enabled the then Commissioners of Police to make regulations concerning the boundaries of

(1) (1883) 8 App. Cas. 723.

standings for hackney carriages and the number of carriages to be allowed at a standing, and also regulations for enforcing order at places at which metropolitan stage carriages should call, but it gave no power to the Commissioners to make regulations for enforcing order at hackney carriage stands. It contained a provision that every driver of a hackney carriage wilfully disregarding or not conforming himself to the regulations "shall for every such offence forfeit the sum of forty shillings." It was contended on behalf of the appellant that, inasmuch as by s. 8 of the London Hackney Carriages Act, 1850, that Act was to be construed as one Act with the London Hackney Carriages Act, 1843, and the provisions of the Act of 1843 were to extend to the Act of 1850, the penal clause contained in s. 29 of the Act of 1843 applied to a breach of a regulation made under s. 4 of the Act of 1850.

I am not so sure that that point is good. It seems to me open to the contention that, there being a series of sections in each statute as to some of which penalties for breaches apply and as to others not, it by no means follows that because there was power given in s. 4 of the Act of 1850 to make regulations for enforcing order at hackney carriage standings, it was intended that a breach of those regulations should be subject to the same penalty as a breach of the regulations made under s. 29 of the Act of 1843. I have not a very clear opinion upon the point. If the Act of 1850 merely substituted a new authority for the purpose of making regulations, no doubt there would be much to be said in support of the argument that the penalty clause ought to apply to the new regulations. Unless that first point is made good, the point which was raised on behalf of the appellant with regard to the operation of the Statute Law Revision Act, 1874, does not arise, but had I thought that s. 29 of the London Hackney Carriages Act, 1843, clearly applied to regulations made under s. 4 of the London Hackney Carriages Act, 1850, I should have come to the conclusion that the effect of the Statute Law Revision Act, 1874, was not to repeal, so far as the Act of 1850 was concerned, the provision for a penalty contained in s. 29 of the Act of 1843.

In my judgment the answer to the magistrate's objection is a

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broader one and is to be found in the London Hackney Carriage Act, 1853. The Acts of 1843, 1850, and 1853 constitute a series of statutes intended to apply to the government of hackney carriages, and, no doubt, it may well have been thought as legislation progressed that it was better to deal with the matters generally than by specific application of penalties in particular sections. Accordingly in s. 19 of the London Hackney Carriage Act, 1853, it was provided that "for every offence against the provisions of this Act for which no special penalty is hereinbefore appointed the offender shall be liable to a penalty not exceeding forty shillings." Sect. 21 of the Act of 1853 provides that the Act shall be construed as one Act with the Act passed in 1843 and the Act passed in 1850, and that "all the provisions of the said Acts, except so far as is herein otherwise provided, shall extend to this Act, and to all things done in execution of this Act."

I am of opinion that the effect of the provision contained in s. 21 of the Act of 1853 was to make one code or statute for the regulation of hackney carriages, and that therefore a general penal clause for breach of the provisions of the Act of 1853 would apply to any provision contained in the three Acts of 1843, 1850, and 1853. That is the natural effect of this legislation where there are amending Acts intended to be read as one statute. If it be said that a regulation is not a provision of an Act, I am of opinion that *Rex* v. *Walker* (1) is an authority against that proposition. I should certainly have been prepared to hold apart from authority that, where a statute enables an authority to make regulations, a regulation made under the Act becomes for the purpose of obedience or disobedience a provision of the Act. The regulation is only the machinery by which Parliament has determined whether certain things shall or shall not be done.

That, however, does not quite answer the whole of the objection taken by the magistrate. He thought that the penalty provided by s. 19 of the London Hackney Carriage Act, 1853, was intended to be limited to a breach of the provisions of the Act of 1853. In my judgment, when this class of legislation is being dealt with,

(1) (1875) L. R. 10 Q. B. 355.

legislation by which statutes are from time to time amended and incorporated, and a general enactment as to a penalty is found in an amending and incorporating statute, the scope of that enactment is not to deal with particular sections of the particular amending and incorporating statute in which there is no penalty, but it is for the purpose of providing by general legislation that obedience to all the series of statutes and regulations made thereunder shall be enforced by the penalty. In the present case, therefore, it becomes immaterial to decide whether the earlier provisions of the Act of 1843 have been repealed or not. Further, it is very difficult to see why, unless there is some power of enforcing regulations made under the London Hackney Carriages Act, 1850, the particular enactment in regard to a driver of hackney carriages obeying regulations contained in s. 29 of the London Hackney Carriages Act, 1843, should have been struck out by the Statute Law Revision Act, 1874. It appears to me that it was probably considered that obedience was enforced by the general enactment contained in s. 19 of the Act of 1853 being applicable to all three statutes. In my judgment there was power for the magistrate to inflict the penalty, and the case must go back to be dealt with on the merits.

BIGHAM J. I am of the same opinion. For the purpose of the present case I do not think that it is necessary to consider the effect of the London Hackney Carriages Act, 1843. By s. 4 of the London Hackney Carriages Act, 1850, power is given to the Commissioners of Police to make such regulations from time to time as they shall deem proper for enforcing order at hackney carriage stands. They have exercised their authority under that section and have made regulations which they thought proper. One of those regulations is alleged to have been broken by the respondent. It is said on his behalf that he cannot be punished by the infliction of a fine, and it is quite true that under s. 4 of the Act of 1850—the section under which these regulations were made—there is no provision for a penalty, nor does there appear to be any provision for a penalty in that particular statute. But it is necessary to consider the London Hackney Carriage Act, 1853, which by its terms incorporates the Act of 1850 and directs

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that the two statutes shall be read as one. By s. 19 of the Act of 1853 it is provided that "for every offence against the provisions of this Act for which no special penalty is hereinbefore appointed the offender shall be liable to a penalty not exceeding forty shillings." How are the words "against the provisions of this Act" to be read? The two statutes are to be construed as one. In my opinion, to break the regulations made under the authority of a statute is to break the statute itself, and therefore s. 19 of the London Hackney Carriage Act, 1853, must be read thus: "For every offence against the regulations promulgated under these two Acts, which are to be read as one, a penalty not exceeding forty shillings may be imposed."

In those circumstances I think that the magistrate had jurisdiction to impose a penalty for this offence, and that therefore the case ought to go back to him with that direction

WALTON J. I agree. This case is a striking example of the difficulties and obscurity which arise from legislation by reference to and incorporation of other statutes.

Two questions arise: First, whether for a breach of regulations made under s. 4 of the London Hackney Carriages Act, 1850, the penalty provided by s. 29 of the London Hackney Carriages Act, 1843, applies by virtue of the words in s. 8 of the Act of 1850 enacting that the provisions of the Act of 1843, "except so far as is herein otherwise provided, shall extend to this Act, and to all things done in execution of this Act." I feel a difficulty in holding that the penalty provided by s. 29 of the Act of 1843 is by virtue of s. 8 of the Act of 1850 applied to breaches of regulations made under s. 4 of the Act of 1850. The power given by s. 29 of the Act of 1843 is to make regulations as to certain specified matters, and a penalty is enacted for breach of regulations so made. The power to make regulations given by s. 4 of the Act of 1850 is not a power given to a different authority to make regulations such as were authorized by s. 29 of the Act of 1843, nor is it a mere repetition of that section. It is in my opinion a power given to the same authority to make regulations as to matters which are very similar to but not quite the same as those specified in s. 29 of the Act of 1843,

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The question is therefore whether the penalty which is enacted in the Act of 1843 for the breach of regulations of one kind is applied by s. 8 of the Act of 1850 to regulations made under that Act which may be of a different kind. I have a difficulty in saying that the penalty is so applied.

Upon the second question, again not without some difficulty, I have come to the conclusion that in the present case there was charged against the respondent an "offence against the provisions of this Act" within the meaning of s. 19 of the Act of 1853. It seems clear that the Act of 1850 must be read as one—construed as one—with the Act of 1853, and therefore s. 4 of the Act of 1850 has now exactly the same effect as if it were in fact a section contained in the Act of 1853, and I have come to the conclusion that, if the facts should be proved hereafter, there was a breach of the provisions of s. 4 of the Act of 1850. That section gives power to make regulations, and I think there is involved in this that regulations so made must be obeyed, and if so it follows that a breach of such regulations is a breach of the law contained in that section. Sect. 4 of the Act of 1850 is made a provision of the Act of 1853, and therefore I think that the alleged offence was one "against the provisions of this Act" within the meaning of s. 19 of the Act of 1853. My difficulty has been—and I had considerable doubt about it at first—as to whether the words "provisions of this Act" can be read as meaning or including "regulations made under this Act," assuming that the regulations were made under this Act, i.e., under the Act of 1853; whether there is not a distinction between provisions of the Act and regulations made under the Act; and whether one can read s. 19 of the Act of 1853 as if the words were "for every offence against the provisions of this Act, or regulations made under this Act." The doubt largely arises from the fact that in the Act of 1853 there is a series of provisions, e.g., in ss. 14, 15, and 16, which are express provisions of the Act, and to which directly, and naturally, the words of s. 19 apply. My doubt is whether s. 19 was intended to apply to anything beyond offences against express provisions contained in the Act of 1853. However, on the whole I have come to the conclusion that it applies

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to any breach of what must be construed as being a provision of the Act of 1853. In my judgment an offence against s. 4 of the Act of 1850 is an offence within the meaning of s. 19 of the Act of 1853.

Case remitted.

Solicitors for appellant: *Wontner & Sons.*
Solicitor for respondent: *H. Danger.*

J. E. A.

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Oct. 29.

ACTON DISTRICT COUNCIL *v.* LONDON UNITED TRAMWAYS.

Tramway—Duty of Tramway Company to maintain Road in good Repair—Removal of Snow—Tramways Act, 1870 (33 & 34 *Vict. c.* 78), *s.* 28.

The removal of snow from the portion of a road lying between the rails of a tramway is not part of the "maintenance" of that portion within the meaning of s. 28 of the Tramways Act, 1870, so as to cast upon the tramway company the duty of removing it, unless the fall of snow is of such a depth as to render the road impassable. The mere fact that the removal of the snow will render the passage over the road more convenient is not enough to bring the case within the meaning of the section.

APPEAL from the county court of Brentford.

By certain agreements made between the plaintiffs and the county council of Middlesex under s. 11, sub-s. 4, of the Local Government Act, 1888, the plaintiffs undertook the duty of scavenging and watering and removing snow from the main roads in their district, including a road known as High Street. The defendants are the owners of a tramway laid along the said High Street. On the night of December 25, 1906, there was a heavy fall of snow in the district, and on the morning of the 26th the snow was lying in High Street to a depth of four or five inches. The defendants, by means of a snow plough, pushed the snow from off the portion of the road upon which their tramway lay on to the sides of the road so as to form a bank of snow on either side of the tramway and left it there. The plaintiffs, under their

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agreement with the county council, removed the whole of the snow from the road, including the two banks above mentioned. They then brought this action in the county court to recover from the defendants the cost of removing so much of the snow as had fallen upon the portion of the road occupied by the tramway, upon the ground that the defendants had been compellable to remove it under s. 28 of the Tramways Act, 1870 (1), such removal being, it was alleged, necessary to the maintenance of the road and the keeping of it in good condition. The county court judge held that the section did not impose upon the defendants any obligation to remove the snow, and that the plaintiffs could not recover. The plaintiffs appealed.

Naldrett, for the plaintiffs. The defendants are bound, under s. 28 of the Tramways Act, 1870, to "at all times maintain and keep in good condition" so much of the road on which the tramway is laid as lies between the rails, and eighteen inches beyond on either side. The removal of the snow from the road was in the nature of maintenance. In *Amesbury Union* v. *Wilts* (2) it was held that the expense of removing snow from a road was an "expense incurred in the maintenance" of the road within s. 13 of the Highways and Locomotives Amendment Act, 1878 (41 & 42 Vict. c. 77). Cave J. said: "In respect of either a permanent or a temporary obstruction the public have a right to have the road made fit for use, and the authorities are bound to do what is necessary." A road in an urban district with four

(1) By the Tramways Act, 1870, s. 28: "The promoters shall at their own expense at all times maintain and keep in good condition and repair, with such materials and in such manner as the road authority shall direct, and to their satisfaction, so much of any road whereon any tramway belonging to them is laid as lies between the rails of the tramway . . . . and . . . . so much of the road as extends eighteen inches beyond the rails of and on each side of any such tramway. . . . . Provided always that if the promoters fail to comply with the provisions of this section, the road authority, if they think fit, may themselves at any time after seven days notice to the promoters open and break up the road and do the works necessary for the repair and maintenance or restoration of the road, to the extent in this section above mentioned, and the expense incurred by the road authority in so doing shall be repaid to them by the promoters."

(2) (1883) 10 Q. B. D. 480.

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or five inches of snow upon it is not as fit for use as the public have a right to require it to be. Any scavenging which is done to facilitate traffic, and not merely for sanitary purposes, comes under the head of maintenance. In *Warminster Local Board* v. *Wilts County Council* (1) the question, amongst others, was submitted to the Court whether, under s. 11 of the Local Government Act, 1888, which provides that main roads shall be "wholly maintained and repaired" by the county council, the council were liable for the expense of "scavenging, cleansing, and watering" main roads, and the Court held that they were. In *Dublin United Tramways* v. *Fitzgerald* (2) it was decided under the section now before the Court that a tramway company is bound to keep its part of the highway in a fit and safe condition for the passing traffic, and in the case of a road paved with granite setts it is bound, in the event of the setts becoming worn, to put down sand to prevent the road from being slippery. The removal of snow is just as much part of maintenance as is the temporary scattering of sand.

Nield, for the defendants. The removal of a temporary obstruction like snow is not a duty imposed on the tramway company under s. 28 of the Tramways Act, 1870. This is shewn by the proviso at the end of the section, that "if the promoters fail to comply with the provisions of this section, the road authority . . . . may . . . . after seven days notice to the promoters open and break up the road and do the works necessary for the repair and maintenance or restoration of the road, to the extent in this section above mentioned, and the expense incurred by the road authority in so doing shall be repaid to them by the promoters." It is a condition of the road authority's right to recover the expense that they should have given the prescribed notice, and in the case of snow the necessity of doing the work would presumably have ceased before the notice had expired. The snow would have melted. The case of *Amesbury Union* v. *Wilts* (3) was decided under a different Act, which contained no similar proviso. And, moreover, there the snow was not a mere inconvenience; the case stated that the fall had been so severe

(1) (1890) 25 Q. B. D. 450. (2) [1903] A. C. 99.
(3) 10 Q. B. D. 480.

as to render the roads in question wholly impassable. In *Dublin United Tramways* v. *Fitzgerald*(1) the sand was necessary to render the road safe for vehicular traffic. There is no suggestion that the few inches of snow here made the road unsafe.

Naldrett, in reply. The provision in s. 28 as to the road authority giving a seven days' notice before doing the work is directory only; it is not a condition precedent to their right to recover the expense of doing it.

DARLING J. In this case the question which we have to decide is whether there was a duty upon the tramway company, by virtue of s. 28 of the Tramways Act, 1870, to remove so much of the snow as fell upon the tramway track. The section provides that "The promoters shall at their own expense at all times maintain and keep in good condition and repair, with such materials and in such manner as the road authority shall direct," the portion of the road occupied by them. Then comes a proviso which throws considerable light on what was meant by maintenance and repair; it is to the effect that if promoters fail to comply with the section, "the road authority . . . . may themselves at any time after seven days notice to the promoters open and break up the road and do the works necessary for the repair and maintenance," and, having done it, shall be reimbursed by the promoters. The county court judge held that the language of the section pointed rather to the maintenance and repair of the materials of which the roadway was formed, and was not intended to cover a fall of snow of the kind with which he had to deal, and I agree with the conclusion at which he arrived.

The case of *Amesbury Union* v. *Wilts* (2) differs materially from the present, for there there was a distinct finding that the snow had fallen to such a depth as to create a distinct obstruction to the traffic; it was such as to render the road impassable, and, as the company were bound to maintain their portion of the road in a fit condition for public traffic, there was a duty upon them to remove the snow. But there is nothing of that kind here. The appeal of the district council must be dismissed.

(1) [1903] A. C. 99 (2) 10 Q. B. D. 480.

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WALTON J. I agree. The appellants contended that the removal of the snow was part of the company's duty of maintaining the tramway track and keeping it in good condition. But I do not think that contention can be supported. The case of *Dublin United Tramways* v. *Fitzgerald* (1), which was relied upon by the appellants, seems to me to be a very different case. There the structure of the road itself was defective. It was paved with granite setts which had worn slippery, and the defendants were under an obligation to remedy that defect, which they might do either by taking up the setts and redressing them or by scattering sand. If they did neither it is obvious that they would be liable for any damage that happened in consequence. But here there was nothing wrong with the structure. The case of *Amesbury Union* v. *Wilts* (2), although decided under another Act, is more like the present. There the question arose whether the expense of removing snow which had fallen upon the highway was an expense incurred in the maintenance of the road within the meaning of s. 13 of the Highways and Locomotives Amendment Act, 1878. It was held that it was. Cave J. pointed out that it had already been decided in *Reg.* v. *Greenhow* (3) that where a road becomes impassable by reason of material coming on to it the road authority is not relieved from the liability to repair it, and he was of opinion that it made no difference in this respect whether the foreign material caused an obstruction of a permanent nature, or whether it was temporary only, as in the case of snow. And it is now contended that s. 28 of the Tramways Act, 1870, should be construed in the same way as the Court in the *Amesbury Case* (2) construed the section then before them. It may be that in a similar case it should be so. But in the *Amesbury Case* (2) the fall of snow had been so heavy as to render the road impassable and unfit for traffic. Whereas here there is no evidence that the snow as it lay on the tramway track rendered the road unfit for traffic. No doubt the removal of it would have rendered the road more convenient, but I do not think that scavenging for the purpose of making a road more convenient for traffic, as distinguished

(1) [1903] A. C. 99. (2) 10 Q. B. D. 480.
(3) (1876) 1 Q. B. D. 703.

from removing an obstruction to traffic, falls within s. 28 of the Act of 1870.

Appeal dismissed.

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Solicitors for plaintiffs: *Hemsley & Co.*

Solicitors for defendants: *Stanley, Wasbrough, Doggett & Baker.*

J. F. C.

CHAPMAN *v.* SMETHURST.

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Nov. 4.

Promissory Note—Company—Signature by Director—Personal Liability.

A promissory note was signed by the managing director of a company in the following form: "Six months after demand I promise to pay to Mrs. M. Chapman the sum of 300*l.* for value received together with six per cent interest per annum. J. H. Smethurst's Laundry and Dye Works Limited. J. H. Smethurst, Managing Director." In an action against the managing director:—

Held, that he was personally liable.

TRIAL of action before Channell J. without a jury.

The defendant had previously to 1893 carried on a laundry business, and in that year he converted it into a company, he taking practically the whole of the ordinary shares, and being one of the only two directors. The company had power to borrow money on promissory notes. In September, 1900, the defendant and his co-director borrowed 300*l.* for the company from the plaintiff for the purpose of improving the company's premises and they gave the plaintiff a promissory note in the following form:—

"Six months after demand I promise to pay to Mrs. M. Chapman the sum of 300*l.* for value received together with six per cent. interest per annum.

"J. H. Smethurst's Laundry and Dye Works Limited.

"J. H. Smethurst, Managing Director."

The words "J. H. Smethurst's Laundry and Dye Works Limited" and the words "managing director" were stamped on the note by means of a rubber stamp. The rest of the note was

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in writing. The money borrowed was applied for the company's purposes, and the interest was from time to time paid by the company's cheques. The plaintiff sued the defendant upon the note.

Barnard Lailey, for the plaintiff. The defendant is personally liable. There is nothing in the body of the note to shew that it is the company's note. On the contrary, the use of the word "I" points to the conclusion that the promisor is the defendant, and not the company. Then, if the promise is that of the defendant, he is liable unless he can shew that he promised as agent for the company. It was not enough for that purpose to add the words "managing director" after his name; he should have stated on the note not merely that he was managing director, but that he contracted as such on behalf of the company. In *Dutton* v. *Marsh* (1) four directors of a joint stock company signed their names to a promissory note in this form: "We the directors of the Isle of Man Slate Company Limited do promise to pay &c." In the corner of the note the company's seal was affixed and witnessed. It was held that the directors were personally liable. Then if the seal of the company in that case did not make the note the company's note, neither can the insertion of the company's name in the present case.

Henlé, for the defendant. The company alone are liable on the note. It is signed by the company by means of their stamp, and countersigned by the defendant as being the person who had the company's authority to affix their signature. By s. 47 of the Companies Act, 1862 (25 & 26 Vict. c. 89), "A promissory note . . . . shall be deemed to have been made . . . . on behalf of any company under this Act if made . . . . in the name of the company by any person acting under the authority of the company." If the name of the company placed immediately before that of the defendant was not intended for the signature of the company, what was it placed there for? The stamp was the company's ordinary mode of signature, and if they had intended to sign the note, how could they have done it otherwise than in the way in which they did? The use of the pronoun "I" in the body

(1) (1871) L. R. 6 Q. B. 361.

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of the note does not exclude the intention of the company being the promisor. In *Alexander* v. *Sizer* (1), where the note began "On demand I promise to pay" and was signed "For Mistley Thorpe and Walton Railway Company. John Sizer, Secretary," the secretary so signing the note was held not personally liable. It is true that in that case there was the addition of the word "for" before the name of the company, which is not to be found here. But that was not treated as the important word. Kelly C.B. said: "Although in the body of it the personal pronoun 'I' is used it is signed 'John Sizer, *Secretary*' for the company. Unless intended to be the company's note and not his own it is difficult to see why it was signed as 'secretary' at all, or why the company's name was introduced into it." Those observations apply with equal force here. In *Lindus* v. *Melrose* (2) the form of the note was, "We jointly promise to pay to F. S. or order 600*l.* for value received in stock on account of the —— Company," and it was signed by three directors of the company. It was held that it was the company's note, and that the directors signing it were not liable. The Court adopted the view that the words "for value received in stock" should be read as parenthetical, and that the words "on account of the company" referred to the promise. But they did not hold that the latter words were essential to relieve the directors. Bramwell B., in the Court below, said: "If the words had been 'Three months after date we jointly promise to pay —— 600*l.* for value received by the company,' and it had been signed by three directors and countersigned by the secretary, I am by no means sure it would not have bound the company, although it did not state that it was made 'on account of the company.'" And in the Exchequer Chamber Coleridge J. said that, even if the words "for value received in stock" were not read as being in a parenthesis, still they shewed that it was the company's note, for the company received the whole consideration, and it was improbable that the directors should intend to make themselves personally liable when they got no consideration for doing so. That reasoning applies to the present case, for the loan which was the consideration for the

(1) (1869) L. R. 4 Ex. 102. (2) (1857) 2 H. & N. 293; 3 H. & N. 177.

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note was received by the company and not by the defendant, and interest was paid upon it by the company.

Lailey in reply.

CHANNELL J. This case is very much upon the line, and it is difficult to form a very clear and confident opinion upon it. The question is whether the promise to pay the money was a personal promise of the defendant, or whether it was a promise of the company of which he was the managing director. That depends upon the intention of the parties, which intention I think must be gathered from the terms of the document alone. I do not think it is possible upon this document to say that it was a promise of both. It was a promise of either one or the other, and the question is which. The note starts with the words "Six months after demand I promise to pay." I think the word "I" is very strong to shew that the promisor was a person in the ordinary sense, an individual, and not the legal persona of a company, and that the name of the company at the end of the note is not to be treated as the signature of the maker of the note. It has been urged on behalf of the defendant that the fact of the name of the company and the words "managing director" having been put on the document by means of a stamp points to the opposite conclusion, the stamp having been obviously designed for use as the signature of the company. But I must look at the document as a whole, and, so looking at it, I think I must give to the stamped words the same effect as if they had been written. None of the authorities which have been cited exactly cover this case. In *Dutton* v. *Marsh* (1) the words were, "We the directors of the —— Company do promise to pay"—they indicated distinctly that it was the directors, and not the company, that promised to pay. So that there you have got stronger words than you have got here. Nor are the cases of *Alexander* v. *Sizer* (2) or *Lindus* v. *Melrose* (3) in point, because they contain the words "for the company" or "on account of the company," making it clear that the person signing signed only as agent and incurred no personal liability. In the latter case Coleridge J., delivering the

(1) L. R. 6 Q. B. 361. (2) L. R. 4 Ex. 102.
(3) 2 H. & N. 293; 3 H. & N. 177.

judgment of the Exchequer Chamber (1), stated the rule to be "that an agent putting his name to a mercantile instrument is liable as principal unless the instrument distinctly shews that he signs as agent." That is no doubt the governing rule in all these cases. It is not sufficient for the party signing to describe himself as agent; he must shew that he signs as agent and contracts as agent. But where he shews by the use of such words as "for" or "on behalf of" that he contracts only as agent, the use of the personal pronoun "I" will not impose upon him any personal liability. This was the case in *Alexander* v. *Sizer* (2), where the words "I promise to pay" were followed by the signature "For Mistley, [&c.] Railway Company. John Sizer, Secretary." In the present case I think that "I" means Mr. Smethurst, the defendant. He has promised to pay, and has not qualified that promise by saying that he promises "as managing director" or "for" or "on account of" the company. The result is that I must hold him personally liable.

Judgment for the plaintiff.

Solicitors for plaintiff: *Mackrell & Ward, for H. J. Whitehead & Son, Cambridge.*

Solicitors for defendant: *Morten & Cutler.*

(1) 3 H. & N. 177.

(2) L. R. 4 Ex. 102.

J. F. C.

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Nov. 5.

BORWICK *v.* SOUTHWARK CORPORATION.

Rates — Occupation — Empty Building — Intention to use when Occasion requires.

A firm of manufacturers purchased a building with the object of having premises to which they might transfer their business in the event of their existing factory being burnt or other emergency arising. They put into the building and affixed to the walls some shafting and wooden benches suitable for their business, but no engine or motive power, and it was incapable of being used for that business until further fitted up for the purpose. There were no chattels in it, and except as above mentioned it was wholly empty:—

Held, that the act of the owners in keeping the premises in readiness for use in their business at any moment that they might be required amounted to occupation of the premises by them, so as to render them liable to be rated in respect of them.

Case stated by justices of London.

A complaint was preferred against the appellants for the non-payment of an instalment of a general rate made on April 2, 1908, due in respect of a certain warehouse situate in East Street, Walworth.

At the hearing of the complaint the following facts were proved or admitted:—

The warehouse in question consists of a large room, forty-four feet by twenty-six feet, and two smaller rooms connected with it, each thirty-three feet by twelve feet. The said premises are assessed at 64*l.* rateable value. A length of about twenty feet of steel shafting two inches in diameter has been fixed to the timber supporting the roof in one of the smaller rooms. This shafting cannot be utilized without an engine and motive power, and these have not been provided or placed upon the premises, although the instalment of such power would take but a short space of time. Wooden benches, some of which extend along the length of the larger room, have been built by being let into the walls and by resting on wooden supports which are nailed to the floor for the purpose of being kept in position. The surface of the benches is divided into equal lengths by wooden uprights a few inches high, shewing the space allotted

to a worker, with the result that about seventy spaces are formed. A part of the appellants' business would be carried on at the spaces without further fitting up of the room. There are two wooden shelves affixed to the wall in the other of the smaller rooms. The above-mentioned fixtures have not been made use of in any way. Certain chattels of use in connection with the business of the appellants formerly on these premises, but not during the currency of the rate in question, were removed to a house belonging to the appellants and which adjoins the said premises. They could be reinstalled during the course of a day. Rates are paid in respect of the said adjoining house. The premises have been kept closed and have not been used for any business or other purpose since the rate was made or since the appellants became the owners of the premises in 1903. Gas pipes and water supply are laid on to the premises, but no gas or water has been in fact used there. There is no gas meter on the premises. The premises are ready to be let to a tenant if so desired, or to be used by the owners if required. No attempt has been made to let the premises at any time since the appellants became owners, nor is there any present intention to let them.

The appellants are manufacturers of baking powder and carry on their business at Chiswell Street and Bunhill Row, in the city of London. They purchased the premises in East Street, Walworth, in the year 1903 and repaired them, so that in the event of the sale of their present business premises or in the case of fire or other emergency they might transfer their manufacturing business to the premises in East Street. They at the same time fixed the wooden benches, shelves, and shafting. No business has been carried on at East Street, and the premises cannot be used for the purposes of the appellants' business generally until fitted up for the purpose. It would be necessary to provide machinery and motive power. The possession of these premises, into which the appellants might move at short notice, is of value to them.

The appellants contended that they were not in occupation of the premises and were not liable to pay rates in respect of them.

The respondents contended that the appellants were in

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occupation of the premises by virtue of the fact that they were being maintained in such a state as to satisfy one of the objects with which they were bought, namely, that of providing "stand by" premises to be used in case of sudden emergency, and that the possession of premises of that nature is of value to the appellants.

The justices held that the appellants were in occupation of the premises and accordingly issued a distress warrant for the payment of the rate.

Macmorran, K.C., and *Naldrett*, for the appellants. There was no occupation of the premises by the appellants, for they did not in fact use them for any purpose. The possession of an empty building, of which the possessor does not in fact make any present use, does not amount to constructive occupation of it by him merely because he intends to occupy it at a future date if and when occasion should arise rendering it desirable for him to do so. If a man buys a house to live in when he wants it, but puts no furniture in it, his ownership and consequent power of occupying it do not make him an occupier. It would be otherwise if the owner had some furniture or other chattels upon the premises, for then he would in fact make a use of the premises as a storehouse for the chattels, even though he did not use them in any other respect. But here there was nothing in the nature of chattels upon the premises. The shafting, benches, and shelves were all fixed to the soil. The case of *Rex* v. *Melladew* (1) is distinguishable. There the owner of a warehouse, which for the time being, owing to the absence of customers, was empty, held himself out as ready to let storage room in his warehouse to any customer who might desire to deposit his goods there. It was held by the Court of Appeal that the warehouseman could not claim that he was not in occupation of the warehouse and not rateable in respect of it merely because there were no goods in it. But there the warehouseman was in fact in occupation, because he was carrying on his business there, it being part of the business of a warehouseman to hold out his premises as ready for the reception of customers' goods; and when so holding

(1) [1907] 1 K. B. 192.

them out he did not the less carry on his business there because for the moment he happened to have no customers. Here the case expressly finds that no business was carried on by the appellants at East Street. There is also this further distinction: in *Rex* v. *Melladew* (1) the warehouseman had the necessary appliances ready for use when the demand for storage should come, whereas here the premises could not be used for the purposes of the appellants' business generally until fitted up for the purpose with, amongst other things, machinery and motive power. The fact that the appellants derived a benefit from the power to use the premises in certain contingencies did not constitute a present user. In *Smith* v. *New Forest Union* (2) the appellant purchased a plot of building land with the intention of building on it, but he never in fact built on it or used it in any other way. He tried to let it and fixed a bill to a tree growing on it stating that the land was to let. Under these circumstances it was held that he was not in occupation of the land and could not be rated for it. In *Bootle* v. *Liverpool Warehousing Co.* (3) the respondents were the owners of a block of warehouses through which ran some continuous shafting used for the purpose of hoisting goods. Certain of the warehouses were empty, but the shafting revolved in them as well as in the others, so that they were always ready for use. The respondents gave notice to the overseers of their intention not to use the empty warehouses during the current rating year. Upon these facts it was held that there was evidence upon which the justices could properly come to the conclusion that the respondents were not in occupation of the empty warehouses.

Ryde, for the respondents. The possession of an empty building and the consequent power to use it at any moment, coupled with the intention to exercise that power if and when occasion should arise rendering it desirable to do so, is a sufficient occupation to render the possessor liable to be rated in respect of it. It is a question of intention. In *Gage* v. *Wren* (4) the respondent was the tenant under a lease for three years of a house which she used as a boarding-house during the summer

(1) [1907] 1 K. B. 192.
(2) (1889) 60 L. T. 927.
(3) (1901) 85 L. T. 45.
(4) (1902) 87 L. T. 271.

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months. As boarders were not procurable during the winter, she removed her furniture from the house in December, intending to return the following May, until which month the house remained empty. It was held that as she had an intention to return she could not claim exemption from liability to rates during the period that the furniture was out of the house, and she was to be treated as in occupation during the whole year. The Court went upon the animus revertendi. But if it is the intention to make a profitable use of premises as soon as occasion requires that in such a case converts the possession into occupation, it cannot be material whether the possessor has already made a profitable use of them or not. An animus intrandi must for this purpose be as effectual as an animus revertendi. And this would be so even if the appellants here had done nothing to the premises to make them specially suitable for their business. But they have put down shafting and benches for the purposes of that business. If the shafting and benches had been left on the premises loose, the appellants would clearly have been rateable. And here they have gone further and, by fixing them to the walls, made the premises still more ready for use. In *Rex* v. *Melladew* (1) the Court held that it was enough if the owner held the premises out as being in readiness for use by other people. The only difference between that case and the present is that here the owner keeps the premises in readiness for use by himself, a difference which, if anything, makes the case stronger against the appellants, for they have not got the necessity of finding a tenant.

Macmorran, K.C., in reply. In the event suggested of the shafting and benches having been left loose, no doubt the appellants would have been rateable, but only on the basis of the premises being a warehouse, whereas here they are rated as for a factory, which is a very different thing.

LORD ALVERSTONE C.J. I am of opinion that this appeal must fail, though the question is not without difficulty. It seems to me that there was evidence of beneficial occupation. There is no doubt that the appellants can make use of this property if they

(1) [1907] 1 K. B. 192.

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choose, and will do so if and when they require it. I think they are making use of it by having the necessary shafting and benches upon the premises in readiness for use. It was contended that, as those appliances had been affixed to the freehold and become part of the rateable subject-matter, they could not be taken into consideration as affording evidence of occupation. I cannot agree with that. It seems to me that if a man is using premises in the sense of having them ready for his own occupation by storing loose machinery or tools there, the fact that he has gone a step further and fixed the shafting and benches to the walls ought not to rebut the inference that would be drawn from their presence on the premises if they were loose. The distinction between the case of *Bootle* v. *Liverpool Warehousing Co.* (1) and the present is that in the former the judges came to the conclusion of fact that the owners had no intention to carry on their business in the particular premises which it was sought to rate, whereas here I think the facts do point to an intention on the part of the appellants to carry on their business upon the premises at any moment that they may require to do so. I cannot think, therefore, that there is no evidence of occupation. It has been suggested that if the shafting and benches were loose the building would be rateable only as a warehouse and not as a factory. But that is an objection which goes only to the question of quantum; it is matter of appeal, and cannot be raised on an application for a distress warrant. I express no opinion what the quantum should be under the circumstances of this case.

BIGHAM J. I am of opinion that Messrs. Borwick have been properly rated. The only question is whether in the circumstances of the case they were in "occupation" of the premises. I think they were. "Occupation" in relation to rateability is constituted of legal possession and of permanent (as distinguished from mere temporary) user. There is no doubt that the appellants were in legal possession. The doubt, if any, is whether they were making a permanent use of the premises.

(1) 85 L. T. 45.

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This doubt, however, is solved by the facts stated. The appellants have erected and are maintaining in the building shafting, which it is true is nailed to the walls, but which can nevertheless be utilized in a short space of time by the simple introduction of motive power. Benches for the people who may have to work in the building in connection with the appellants' business are provided. Certain chattels used in the business are kept in readiness in an adjoining building; and no attempt has been made or is being made to let the premises to any other tenant. It is, I think, obvious from these circumstances that the place is kept by the appellants as a "stand by" for use at any moment when the exigencies of their business may make it desirable to so use it, and is in readiness for such use. Such a state of things constitutes, in my opinion, a permanent user so as to create an "occupation."

Cases of this kind depend much more on fact than on law. Whether a man "occupies" or not is in each case a question of intention to be ascertained with reference to the particular circumstances, and if there are facts which one way or the other can reasonably support the conclusion at which the justices arrive, I do not think this Court should interfere with that conclusion. It is a finding of fact. The *Bootle Case* (1) and *Melladew's Case* (2) are said to raise some doubt as to the law, but I do not think they do. Occupation is and must always be a mere question of fact which may involve a question of intention, and the only question of law is whether there is evidence which can reasonably support the finding, whatever it may be. The difficulty, if there be any, in reconciling the two authorities cited arises, not from any doubt as to the law, but from the different conclusions of fact which were arrived at in circumstances which perhaps at first sight appear somewhat similar.

WALTON J. I agree. In *Rex* v. *Melladew* (2) Farwell L.J. in delivering judgment, speaking of the warehouse in question in that case, said that the respondent merely kept it as spare room. I think the premises in question here were kept by the appellants really as spare room, not perhaps to be used additionally to the

(1) 85 L. T. 45. (2) [1907] 1 K. B. 192.

other premises, but alternatively, to be used at any moment in case the other premises should be unfit for use. Under those circumstances I think the appellants were in occupation.

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Appeal dismissed.

Solicitors for appellants: *Houghton & Son.*

Solicitor for respondents: *J. A. Johnson, Town Clerk, Southwark.*

J. F. C.

HUDSON, APPELLANT *v.* RHODES, RESPONDENT.

1908
Nov. 5, 6.

Rates—Valuation List—Assessment Committee—Objection of Ratepayer that Assessment too high—Power of Committee to raise Objector's Assessment—Union Assessment Committee Act, 1864 (27 & 28 *Vict. c.* 39), *s.* 1.

A rate was made based upon the valuation list then in force, and a demand note for the rate was served upon a ratepayer. He gave notice of objection to the assessment committee, under s. 1 of the Union Assessment Committee Act, 1864, that the assessment in the valuation list of the premises in respect of which he was rated was too high. The assessment committee heard the objection and, instead of merely refusing him relief, raised the assessment and amended the valuation list accordingly. They gave notice of the amendment to the overseers, who accordingly altered the current rate and served upon the ratepayer a fresh demand note for a larger sum based upon the increased assessment. The ratepayer paid the amount of the original demand note, but refused to pay more. On a complaint for non-payment of the balance the magistrate refused to issue his distress warrant:—

Held, that the assessment committee had no power to raise the ratepayer's assessment, that the amended rate was consequently a nullity, and that the magistrate was right in dismissing the complaint.

CASE stated by the stipendiary magistrate for Bradford.

The respondent, William Rhodes, was on March 23, 1908, summoned at the instance of the appellant, the assistant overseer of the poor of the township of Bradford, for non-payment of a sum of 17*s.* 8*d.* in respect of rates.

On the hearing of the summons the following facts were proved or admitted:—

On August 14, 1907, the respondent was served with a demand

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note by the overseers for the payment of a poor rate of 6*s.* 4*d.* in the pound and a general district rate of 2*s.* 6*d.* in the pound which were made on April 6, 1907, in respect of the premises, No. 127, North Wing, in the city of Bradford, occupied by him, and which rates were based upon the valuation list of the township of Bradford which had been duly made, deposited, and finally approved of, and was then in force. In the said valuation list it was stated that the gross value of the premises was 44*l.* and the rateable value 37*l.* In the demand note it was stated that the rateable value of the premises was 37*l.* and the amount of the rates was 16*l.* 6*s.* 10*d.*

The respondent had on July 26, 1907, objected to the valuation list upon the ground that the assessment of the said premises in the valuation list was too high.

On October 4, 1907, the assessment committee heard and determined the objection and failed to give the relief claimed, but, on the contrary, increased the assessment to 46*l.* gross value and 39*l.* rateable, and they thereupon amended the valuation list accordingly and gave notice of the amendment to the overseers, who on October 10 altered the then current rates accordingly. No new supplemental valuation list shewing such increased assessment and the amounts thereof has been made, deposited, and approved of.

On October 30 the respondent was served with a further amended demand note by the overseers for the payment of the poor and district rates based on the increased assessment, in which it was stated that the rateable value of the premises was 39*l.* and the amount of the rates 17*l.* 4*s.* 6*d.*, an increase of 17*s.* 8*d.*

On December 28 the respondent paid in respect of rates the sum demanded by the original demand note of August 14, but refused to pay the balance.

For the appellant it was contended (1.) that the proper remedy of the respondent was by appeal to quarter sessions, and that the magistrate had no jurisdiction to hear and determine the respondent's objections to the summons or to refuse to issue the distress warrant under the circumstances; and (2.) that the assessment committee having amended the valuation list and

given notice of the amendment to the overseers, the latter were compelled by s. 1 of the Union Assessment Committee Act, 1864 (1), to alter the current rate accordingly, and that the validity of such alteration could only be contested on an appeal to quarter sessions.

For the respondent it was contended (1.) that it was a good answer to the summons to shew that the rate was a nullity; (2.) that the rate was a nullity; (3.) that the assessment committee had no power to amend the valuation list by increasing the respondent's assessment, and that the overseers had no power to alter the current rate accordingly.

The magistrate held that the respondent's contentions were correct. He therefore dismissed the summons subject to a case for the opinion of the Court.

C. A. Russell, K.C., and *R. Cunningham Glen*, for the appellant. The magistrate was wrong in holding that the assessment committee had no power to raise the respondent's assessment. Sect. 1 of the Assessment Committee Act, 1864, gives them "full power to call for and amend such list." That language does not limit their power to amendment in one direction only; it must mean that they are to have power to amend either by lowering the assessment or raising it. And if

(1) By s. 1 of the Union Assessment Committee Act, 1864, it is provided that, "Before any appeal shall be heard by any special or quarter sessions against a poor rate made for any parish contained in any union to which the Union Assessment Committee Act, 1862, applies, the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal and the grounds thereof to the assessment committee of such union; Provided that . . . . no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by such committee unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just; and which objection, after notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear with full power to call for and amend such list, although the same has been approved of, and no subsequent list has been transmitted to them, and if they amend the same shall give notice of such amendment to the overseers, who shall thereupon alter their then current rate accordingly."

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they had such power, the amended rate cannot be treated as a nullity, for the section expressly provides that in the event of their amendment they shall give notice to the overseers, who are then to alter the current rate accordingly. Secondly, even if the committee had no power to raise the assessment, the objection was not one that the respondent could take upon the application for a distress warrant; he should have appealed to the quarter sessions. On the application for the distress warrant the grounds upon which the magistrate may go behind the rate are very limited. No doubt the Court has declined to give an exhaustive enumeration of the various objections that may be taken on such an application: per Lord Alverstone C.J. in *Cheney* v. *Tallowin* (1); but the decided cases shew that the objection must be based on some mistake on the part of the overseers, as for instance that the person summoned by them is not the person described in the rate, or that he was not in occupation of the premises, or that the property was not situate in the parish. And here the mistake alleged was on the part, not of the overseers, but of the assessment committee. If there were any grounds upon which the committee might lawfully raise a ratepayer's assessment, the magistrate cannot inquire into the particular grounds upon which the amendment was made. Here it cannot be disputed that upon an appeal by another ratepayer that the respondent was under-assessed the committee might have raised his assessment. Therefore the magistrate was bound to assume that the amendment was valid, for there is nothing in the case to suggest that there was any entry in the rate-book indicating the grounds upon which the amendment had been made, and so shewing that the rate was defective on the face of it. The magistrate was not entitled to hear evidence to shew that it was defective.

Simon, K.C., and *Ryde*, for the respondent. The assessment committee had under the circumstances no power to raise the respondent's assessment. Upon an appeal to quarter sessions upon the ground that the rate was too high the justices never had any power to say that the rate was not high enough. If the overseers had made a mistake as to the amount of a ratepayer's

(1) [1904] 2 K. B. 763.

rental and assessed him too low, there was no machinery for raising it on an appeal by the ratepayer against the rate. The Union Assessment Committee Act, 1862, gave the ratepayer an expeditious method of appealing against the valuation. But it was not intended to give the committee a larger power of amendment than the quarter sessions had before.

[LORD ALVERSTONE C.J. By s. 20 of the Act of 1862 the committee may make any alterations in the valuation of any hereditament in the list as they think proper, "whether any objection be or be not made to any such valuation list."]

Under that Act the objections had to be carried in before the rate was made. But now under the Assessment Committee Act, 1864, s. 1, they may be taken at any time during the currency of the rate; and where, as in the present case, the committee are not asked to make the alteration in the list until after the rate has been made and published, s. 20 of the earlier Act has no application.

[They were stopped by the Court.]

C. A. Russell, K.C., in reply.

LORD ALVERSTONE C.J. This case is very peculiar, and I do not intend to lay down any general principle or to go beyond what I think is necessary for the decision of this case. I should not consider myself bound by what I am about to say in any case in which the facts were not the same. In this case the ratepayer paid upon a rateable value of 37*l.* Subsequently an application was made to the magistrate for a distress warrant for unpaid rates upon an increased rateable value of 2*l.* Now I quite agree with Mr. Russell that under ordinary circumstances the magistrate is bound by the rate and cannot go behind it for the purpose of determining whether the distress should go. But in the present case the circumstances were unusual. The premises having been originally assessed at 37*l.* and a rate having been made based on that assessment, notice of objection was given to the assessment committee under s. 1 of the Act of 1864. Before he could give notice of appeal the ratepayer, notwithstanding that the rate had already been made, was obliged to go before the committee to satisfy the conditions of

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that section; for although it was at one time thought that the failure to obtain relief from the committee, which is a condition precedent to the right to appeal to the sessions, meant a failure upon an application made before the making of the rate, it has for a long time been decided that the ratepayer must go before the committee after the rate is made. Then, upon such an application, what is it that the assessment committee have to do? It seems to me that their duty is confined either to giving the applicant the relief sought or refusing it. The object of the section was to provide that the ratepayer who thinks the assessment is too high should bring to the notice of the assessment committee the fact that he still objects to the valuation, and the assessment committee were thereby given jurisdiction to deal with that complaint, but not with anything else. They have no jurisdiction under that section to say that the applicant's assessment was too low. I desire to express no opinion upon the question whether or not the assessment committee would have power, after the rate has been made, to raise a ratepayer's assessment upon an application by other ratepayers that his assessment was too low. But upon the ratepayer's own application the duty of the committee is simply to tell him whether he is to have relief or not. Here, then, the committee in altering the valuation list in the way they did acted without jurisdiction. Having done so, they gave notice to the overseers, who altered the current rate accordingly. It is quite true that under s. 1 the overseers must alter the current rate in accordance with the decision of the committee, but in my judgment we ought not to interfere with the decision of a magistrate who has refused to issue a distress warrant in respect of a rate so altered, where the only question before him was whether or not the assessment committee were entitled to raise his assessment upon an application by the ratepayer to have it lowered.

BIGHAM J. I am of the same opinion. The original rate was made on April 6, 1907, the respondent being rated upon an assessment of 37*l*. He thought that assessment too high, and thereupon he determined to appeal. Before he could appeal to the quarter sessions he had to take the proceeding pointed out

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by s. 1 of the Act of 1864. That section provides that "Before any appeal shall be heard by any special or quarter sessions against a poor rate made for any parish contained in any union to which the Union Assessment Committee Act, 1862, applies, the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal, and the grounds thereof, to the assessment committee of such union; Provided that . . . . no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just; and which objection . . . . the committee shall hear with full power to call for and amend such list, although the same has been approved of." Now, in proceeding under that section, what was it that he was asking the assessment committee to do? He was asking them simply one question: "Is my assessment too high? I say it is, and I want you to decide that question for me." They did decide that question for him by finding that it was not too high. But having decided that, they then proceeded upon another and totally different inquiry, Was the assessment too low? That was an inquiry upon which they were not invited to embark, and one which, if invited, they had no jurisdiction to deal with. Having embarked on that inquiry, they found as a fact that it was too low and proceeded to raise it. That in my opinion is something that they had no power to do.

WALTON J. I agree.

Appeal dismissed.

Solicitors for appellant: *Cann & Son, for Stevens, Bradford.*

Solicitors for respondent: *Godden, Son & Holme, for J. Freeman, Bradford.*

J. F. C.

C. A.
1908
Oct. 30;
Nov. 11.

[IN THE COURT OF APPEAL.]

In re WEIGHELL.

Bankruptcy—Small Bankruptcy—Costs—Taxation—Bankruptcy Rules, 1886-1890, *r.* 112, *sub-ss.* 1, 2; *Appendix, Part II.* (*Scale of Costs*).

Rule 112 of the Bankruptcy Rules, 1886-1890, which regulates the scale of costs and charges in proceedings under the Bankruptcy Acts, applies only to proceedings in the Bankruptcy Court.

Therefore where in a small bankruptcy a solicitor, acting upon the instructions of the official receiver, applied to the Probate Court for a grant of letters of administration to the estate of the bankrupt's wife:—

Held, that in taxing the costs of these proceedings as between solicitor and client the scale of costs provided in the case of small bankruptcies by sub-s. 2 of r. 112, whereby the solicitor is allowed three-fifths only of the charges ordinarily allowed, did not apply, and that the solicitor was entitled to his full costs.

In re Parfitt, (1889) 23 Q. B. D. 40, followed and approved.

Appeal from a decision of the Divisional Court (Bigham and Jelf JJ.).

In 1894 John Weighell was adjudicated bankrupt by the Stockton-on-Tees County Court. The Court, being satisfied that the assets were unlikely to exceed 300*l.*, made an order for summary administration of the bankrupt's estate, and the official receiver became the trustee thereof, in accordance with the provisions of s. 121 of the Bankruptcy Act, 1883, as to small bankruptcies. The bankrupt had never applied for his discharge.

In November, 1907, Messrs. Faber, Fawcett & Faber, solicitors, of Stockton-on-Tees, were instructed by the official receiver as such trustee, and pursuant to the retainer of the Board of Trade, to apply for a grant of letters of administration to the estate of the bankrupt's wife, who died during the bankruptcy. Accordingly an application was made under s. 73 of the Court of Probate Act, 1857 (20 & 21 Vict. c. 77), by motion in the Probate Court, and a grant of letters of administration was duly obtained. By virtue of this grant the official receiver was enabled to recover for the benefit of the bankrupt's estate a sum of about 200*l.* which had fallen into possession since the wife's

decease. The solicitors delivered their bill of costs to the official receiver, who approved it subject to taxation. Upon the taxation of the bill of costs by the registrar of the Stockton-on-Tees County Court, the registrar, having regard to the fact that this was a small bankruptcy within s. 121 of the Bankruptcy Act, 1883, held that r. 112, sub-s. 2, of the Bankruptcy Rules, 1886 to 1890, applied, and deducted two-fifths from the profit costs in accordance with that rule, and the county court judge upheld the view of the registrar.

The solicitors appealed to the Divisional Court.

The Divisional Court, upon the authority of *In re Parfitt* (1), allowed the appeal, and directed that the allocatur should go for the full amount of the costs as taxed without any deduction.

The official receiver appealed.

The Solicitor-General (*Sir Samuel Evans, K.C.*) and *S. G. Lushington*, for the appellant. The question is what in small bankruptcies is the scale of costs applicable to non-contentious proceedings in the Probate Court which were necessary for the purpose of realizing the bankrupt's estate. By s. 57 of the Bankruptcy Act, 1883, which section is one of a group of sections headed "Realization of Property," the trustee may with the permission of the committee of inspection (inter alia) "employ a solicitor or other agent to take any proceeding or do any business which may be sanctioned by the committee of inspection," and s. 121, in the case of small bankruptcies, substitutes for the committee of inspection the Board of Trade. Sect. 73 deals with the taxation of costs and provides that all solicitors' bills of costs shall be taxed by the prescribed officer and that no payments shall be allowed in the trustee's accounts without proof of such taxation having been made. Then r. 112 of the Bankruptcy Rules provides (sub-s. 2) that in the case of small bankruptcies "in all proceedings under the Act in which costs are payable out of the estate" a lower scale shall be allowed, namely, "three-fifths of the charges ordinarily allowed, disbursements being added." Reading ss. 57 and 73 with r. 112 and the general regulations at the end of the scale of costs in the

(1) 23 Q. B. D. 40.

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appendix to the rules, the proceedings now in question are proceedings under the Act within the meaning of r. 112, sub-s. 2, and therefore the reduced scale applies. These are proceedings authorized by s. 57 of the Bankruptcy Act and the costs are payable out of the estate: see r. 125. There is no ground for limiting the proceedings referred to in r. 112 to proceedings in the Bankruptcy Court. The object of the Legislature was to prevent small estates from being swallowed up by costs. *In re Parfitt* (1), unless it can be justified under clause 2 of the general regulations, was wrongly decided and ought to be overruled. [They also referred to *In re Procter* (2); *In re Marsh* (3); *In re Dowson*. (4)]

Atkin, K.C., and *Hansell*, for the respondents. Rule 112 contains by reference to the scale of costs a precise definition of proceedings under the Act, because if the scale is looked at it is clear that it relates only to proceedings in the Bankruptcy Court itself. It does not refer to any proceedings other than those which are taken under the Bankruptcy Act in the strict meaning of the words. It cannot be contended that because the official receiver gets his title under the Act and his right to sue under the Act, therefore any proceeding brought by him in any Court for the protection or realization of the bankrupt's property is a proceeding under the Act within the meaning of the rule. *In re Parfitt* (1) proceeds upon the right principle, and it governs this case.

S. G. Lushington, in reply. The operation of the scale of costs is enlarged by the general regulations at the end of the scale.

Cur. adv. vult.

Nov. 11. FLETCHER MOULTON L.J. This case turns entirely on the construction to be put on r. 112 of the general rules under the Bankruptcy Acts, 1883-1890. This rule regulates the scale of costs and charges. It consists of two sub-sections, the first of which is as follows: "The scale of costs set forth in the appendix and the regulations contained in such scale shall, subject to these rules, apply to the taxation and allowance of costs and charges in all proceedings under the Act and these rules."

(1) 23 Q. B. D. 40.
(2) [1891] 2 Q. B. 433; 8 Morr. 251.
(3) (1894) 1 Man. 486.
(4) (1888) 21 Q. B. D. 417.

When we turn to Part II. of the appendix we find that it deals with the "scale of solicitors' costs," and it is obviously the portion of the appendix referred to in the above sub-section. This portion of the appendix consists of six elaborate schedules of costs, all of which by their contents shew that they relate to proceedings in the Bankruptcy Court itself. The items set out therein leave no doubt upon this point. There is a seventh division which completes Part II. and which is headed "General Regulations." There can be no doubt, therefore, that these are the "regulations contained in such scale" referred to in the sub-section. These general regulations deal with various matters not to be found in the first six divisions, but to my mind they are only to be read as ancillary to those scales, providing for sundry matters which may be omitted therefrom, and are in no way intended to extend the operation of those scales. The bulk of them are explanatory or directory, and the only two which by any stretch of interpretation could be made to extend the operation of the scale are Nos. 1 and 2, and of these No. 1 is the only one directly affecting the present case. No. 1 runs as follows: "All costs save as in this scale provided which shall be properly incurred under the provisions of the Act or rules shall be allowed on the 'lower scale' in Appendix N of the Rules of the Supreme Court, 1883." The appellant in this case asks the Court to read this as widening the effect of the scale until it makes it a complete code for all costs whatever incurred in connection with the realization or distribution of the estate of a bankrupt.

To my mind it is impossible to give to it this effect. One consideration alone would in my opinion suffice to demonstrate this. Such proceedings are frequently taken in the county court, and if this were intended to be a complete code for all such costs, it would be a direction that in bankruptcy the costs of county court proceedings should be taxed on the High Court scale, a conclusion which is quite absurd.

But apart from this specific argument there is a more general and more fundamental consideration which to my mind demonstrates the illegitimacy of the proposed construction. I cannot believe that in drawing up these rules an extension of a specific

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scale, relating definitely to proceedings in the Bankruptcy Court only, to all proceedings connected with the realization of an estate would be effected by words so inadequate to deal with the subject. Take for example the case of a bankruptcy of a large estate in which heavy proceedings in the nature of actions have to be taken or defended in the High Court. By the Rules of the Supreme Court the proper costs to be allowed to the parties in such cases are decided in accordance with certain well-known principles. I cannot bring myself to believe that r. 112 was intended to make such proceedings exceptional in this respect. To adopt the suggested interpretation would be to say that where a third party brings or defends proceedings in the High Court he is not to have the same treatment as to costs when he sues, or is sued, by the representative of a bankrupt estate as he would have when he sued, or is sued, by any other third person. I can see no reason or justice in such a provision, and I greatly doubt whether it would be properly within the scope of general rules made under the Bankruptcy Acts. But, whether this is so or not, I should certainly not accept an interpretation which led to such a result unless I felt driven to do so by clear language, and as in my opinion the natural interpretation of the words is that they are intended to be complementary only to the detailed scales that precede them and to fill up any gaps that may have been left therein, and that they are not designed to extend the general application of those scales, I have no hesitation in coming to the conclusion that the costs referred to in r. 112, sub-s. 1, refer to costs in and in connection with proceedings in the Bankruptcy Court alone. The regulation of such costs properly falls within the domain of general rules under the Acts, and I can see no intention of going beyond this their proper province.

I have dealt with r. 112, sub-s. 1, at length because in my opinion sub-s. 2 necessarily relates to the same domain of costs. It provides that in cases of small bankruptcies—i.e., in cases where the estimated assets of the debtor do not exceed the sum of 300*l.*—a lower scale of solicitors' costs shall be allowed in all proceedings under the Act in which costs are payable out of the estate, namely, "three-fifths of the charges ordinarily allowed, disbursements being added." The subject-matter of this rule, "all

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proceedings under the Act," shews that it does not apply to anything to which sub-s. 1 does not also apply, and therefore the reasoning and the conclusion which I have already given in the case of sub-s. 1 apply with equal force to sub-s. 2. But if there had been room for doubt with regard to sub-s. 1, a consideration of the special features of sub-s. 2 would have strengthened the arguments in support of the same conclusion, for it is well known that in some cases costs of non-contentious and even of contentious matters are reduced by the Rules of the Supreme Court or under special statutes where the subject-matter is small. Seeing, then, that in these cases the smallness of the subject-matter has already been taken into consideration in determining the proper costs to be allowed, it would indeed be improbable that the Legislature should have permitted a still further reduction because the transactions were connected with a bankrupt's estate. It was a case of this kind falling under the provisions of paragraph 2 of the general regulations affixed to the scale which came before Cave J. in *In re Parfitt* (1) and led him to adopt the interpretation which I hold to be the right one. This decision is now twenty years old and has been acted on ever since without question until the present case, and the learned judges in the Court below have here decided in accordance with that authority. I should be loth to reverse a decision of such long standing given by so eminent a judge in a matter in which he had special knowledge and great experience, though I should feel bound to do so if in my opinion it proceeded on a wrong construction of the rules, which have now the authority of a statute. As, however, I consider that the decision was perfectly correct, I hold that the judges in the Court below were right both in principle and on authority in deciding as they did, and that this appeal should be dismissed with costs.

COZENS-HARDY M.R. I agree.

FARWELL L.J. I agree.

Appeal dismissed.

Solicitors : *Solicitor to the Board of Trade ; Tatham & Lousada, for Faber, Fawcett & Faber, Stockton-on-Tees.*

(1) 23 Q. B. D. 40.

1908
Nov. 17.

BROOKS *v.* BEIRNSTEIN.

Bailment—Bailee for hire—Hiring Agreement with Option to Purchase—Power to Owner to retake Possession on Breach of Agreement by Hirer—Default of Hirer in payment of Rent—Right of Owner to sue for Arrears of Rent after retaking Possession.

The owner of furniture agreed to let it on hire on the terms of the hirer paying a lump sum in consideration of an option to purchase it at any time during the period of hiring, and further paying a monthly sum by way of rent. The agreement provided that the hirer might at any time terminate the hiring on giving a week's notice and delivering up the goods without prejudice to the owner's right to recover any arrears of rent, and that if the hirer did not duly perform the agreement the owner might retake possession of the furniture. The hirer being in arrear with the rent, the owner retook possession under the agreement:—

Held, that the owner by so retaking possession had not abandoned his right to sue for the arrears of rent.

Hewison v. *Ricketts*, (1894) 63 L. J. (Q.B.) 711, distinguished.

Appeal from Bow County Court.

By an agreement in writing made April 29, 1907, between H. M. Beirnstein and Albert Cahn, trading as the London and Provincial Furnishing Company, therein called the owners, and W. M. Brooks, therein called the hirer, it was agreed that "in consideration of the hirer agreeing to pay the owners 1*l.* on signing this agreement, 14*l.* on or before delivery, and the further sum of 20*l.* on or before June 29, 1907, making in all the sum of 35*l.* (as the consideration for the option of purchase hereby given) . . . . the owners agree to let and the hirer agrees to hire the goods described in the schedule hereto at the rent of 7*l.* per month on the following terms:—

"1. The hirer agrees with the owners as follows:—

"(*a*) To pay punctually the said rent monthly commencing on May 29, 1907. . . . .

"(*c*) That if the hirer does not duly perform and observe this agreement the owners their servants and agents may retake possession of the said furniture and other goods by force or otherwise.

"2. The owners agree with the hirer as follows:—

"(*a*) The hirer may terminate the hiring by giving the owners one week's notice and at the expiration thereof delivering up to

them the said furniture and other goods without prejudice to the owners' right to recover any arrears of rent and damage for any injury to the said furniture and other goods.

"(*b*) If this agreement be duly performed by the hirer the hirer may at any time during the continuance thereof provided the rent be punctually paid in the manner aforesaid purchase by a cash payment the said furniture and other goods of the value named in the schedule hereto in which case credit shall be given for the amount paid for option and rent paid.

"3. The parties hereto expressly agree that the hirer shall in no case be entitled to any credit for the said amount paid for option or for the said rent or any part thereof except on purchase of the said furniture and other goods under the provisions of clause 2 par. (*b*) and that the said furniture and other goods shall otherwise remain the property of the owners subject to the provisions of this agreement only."

The hirer paid the 35*l.*, the consideration for the option of purchase, and the goods were delivered to him. He paid the monthly rent for some months, but eventually got in arrear and owed the owners 51*l.* 5*s.* for rent unpaid. The owners exercised the powers given them by clause 1, paragraph (*e*), of the agreement and retook possession of the goods.

The hirer Brooks having brought an action against the owners to recover a sum of money under another agreement which is not material to this appeal, the defendants counter-claimed for the above-mentioned arrears of rent.

The county court judge held that the right to retake possession of the furniture and the right to sue for the rent were alternative remedies, and that the defendants by retaking possession abandoned their right to recover the arrears of rent.

The defendants appealed.

Montague Shearman, K.C., and *Joyce Thomas*, for the defendants. Under the agreement the defendants were entitled to pursue the remedy by action for the rent in arrear as well as to retake possession. The county court judge thought himself bound by the case of *Hewison* v. *Ricketts* (1), but that case is

(1) 63 L. J. (Q.B.) 711.

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distinguishable. There the agreement provided that the owners should let to the hirer certain omnibuses upon the terms that the hirer should pay a lump sum in advance and twenty-one monthly payments, that in the event of breach of the agreement by the hirer the owners should be at liberty to retake possession, but that upon full payment of all moneys due for hire the omnibuses should become the property of the hirer. The hirer having made default in the monthly payments, the owners seized the goods and subsequently sued for the instalments in arrear. It was held that they could not recover. But the ground of that decision was that the agreement, though in form a hiring agreement, was in substance a contract of sale, though the property was not to pass until all the purchase-money had been paid; that consequently the owners by seizing the goods had deprived the hirer of the whole of the consideration for which the instalments would be paid. There the so-called hirer was bound to continue the monthly payments until the last had been paid; he could not, as in the present case, terminate the agreement in the middle of the period of hiring. That power of the hirer to terminate the agreement is the special feature which in cases of this description determines whether the contract is one of hiring or sale: compare *Helby* v. *Matthews* (1), where there was a power in the hirer to terminate the hiring, with *Lee* v. *Butler* (2), where there was not; in the former of which cases the hirer was held not to be a person who had "agreed to buy goods" within the meaning of s. 9 of the Factors Act, 1889, whereas in the latter it was held that he was.

[BIGHAM J. The result of your contention is that if the hirer is in default and the owner waits until the last instalment is due he may retake the goods and recover the whole of the price as well.]

Yes. If hirers choose to enter into improvident contracts of that kind they cannot be heard to complain. Moreover, the hirer has had a large part of the consideration for the arrears of rent which it is sought to recover, for he has had the use and enjoyment of the furniture.

G. W. Powers, for the plaintiff. The county court judge was

(1) [1895] A. C. 471. (2) [1893] 2 Q. B. 318.

right in holding this case to be undistinguishable from *Hewison* v. *Ricketts*. (1) That case proceeded not upon any distinction between a contract of hiring and a contract of sale, but upon the injustice of allowing the owner to both seize the goods and sue for the stipulated payments and thus get paid twice over. It is analogous to the case of a mortgage; if mortgaged property is foreclosed the mortgagee is not allowed to have the benefit of the foreclosure decree and at the same time to sue upon the covenant.

[BIGHAM J. Did not *Hewison* v. *Ricketts* (1) turn upon the fact that there the passing of the property was the consideration for the payments, and that as the owner by seizing the goods prevented the property from passing the whole consideration failed?]

No, for if it did, that decision would be wrong, and that has not been suggested. For it is obvious that in fact the consideration did not there wholly fail. The hirer had had the use and enjoyment of the omnibuses for a period of several months. It is true he was a purchaser with suspended ownership and not a hirer. But that fact did not affect the quantity of the enjoyment that he had during the period. It was indisputably part of the consideration that he should have the present use and enjoyment, and the fact of his having had it cannot be treated as going for nothing. Further, the terms of the agreement in the present case imply that the owner is not to be entitled to sue for arrears of rent where he himself determines the agreement. For in the clause providing for the hirer terminating the agreement it is expressly stated that it shall be "without prejudice to the owners' right to recover any arrears of rent," whereas the clause providing for the owners retaking possession does not contain any such words. Expressio unius exclusio alterius.

BIGHAM J. The first question in this case is, Is it an agreement for the hiring of the goods, or is it an agreement for the sale of the goods?—and that, of course, depends upon the wording of the agreement. Now I have gone carefully through it and cannot come to any other conclusion than that it is a hiring

(1) 63 L. J. (Q.B.) 711.

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agreement. It includes, no doubt, the granting to the hirer of an option by which if he does certain things he may, if he chooses, become the purchaser of the goods. But there is nothing in the agreement which binds him to buy the goods, though there is a great deal which binds him to pay the hire of them. The plaintiff is therein called the hirer, and he agrees to pay a sum of 35*l.* as the consideration for the option of purchase thereby given, and it is expressly provided that the hirer shall not be entitled to credit for the amount so paid as consideration for the option except in the event of the option being exercised and the purchase effected. The document states that the hirer agrees to hire the goods described in the schedule at a rent of 7*l.* per month and to pay the monthly rent punctually. Then there is a provision that if the hirer does not perform the agreement the owners may retake possession of the furniture by force. The agreement, in so conferring the right to retake possession on a breach by the hirer, does not take away any other rights which the law gives to the owners, among which rights is that of suing for the monthly rent which had already accrued. It is suggested that because the clause which enables the hirer to terminate the hiring provides that such termination will be "without prejudice to the owners' right to recover any arrears of rent," whereas the corresponding clause which enables the owners to retake possession does not contain those words, it was intended that in the event of the owners adopting the remedy provided by the latter clause they should not be entitled to recover any arrears of rent. I do not think the agreement can be so treated as to make it appear that any such intention was in the minds of the parties. If, as I have already said, the agreement is nothing but an agreement for hiring plus an option to purchase, how has the accrued right of action for the rent been got rid of? If it could be said that by taking away the goods the owners had deprived the hirer of all consideration for the rent, then I could understand that the accrued cause of action would be gone. But in truth the hirer has enjoyed the use of the furniture which was the consideration for the rent, and I can see no reason why he should not be liable to pay the arrears claimed.

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WALTON J. I agree. The contract in this case appears to me to be of the class with which the Court had to deal in *Helby* v. *Matthews* (1), and which was there held to be a contract not for the sale of the furniture, but a contract for letting it on hire coupled with a grant to the hirer of an option of purchase, and, that being so, the monthly payments here were payments for the hire, though, as Lord Herschell pointed out, the amount of those payments was probably larger than it would have been if the hiring had not been accompanied with the option of purchase. Then, if that is so, the case of *Hewison* v. *Ricketts* (2) is clearly distinguishable, for there the contract was plainly one of sale and not of hiring.

Appeal allowed.

Solicitors for defendants: *Tredgold & Narlian.*
Solicitors for plaintiffs: *H. Clarkson & Son.*

J. F. C.

In re TAYLOR.
Ex parte BOLTON.

1908
Nov. 16.

Bankruptcy—Practice—Time for entering an Appeal—Deposit on Appeal—Notice of Appeal—Extending Time—Bankruptcy Rules, 1886, *rr.* 130, 131, 132, 134—*Rules of Supreme Court, Order* LVIII., *r.* 1.

On appealing from an order made by a Bankruptcy Court, the appeal must be entered and the deposit paid and the notice of appeal must be given within the time limited for bringing an appeal by r. 130 of the Bankruptcy Rules, 1886.

THIS was an application to extend the time for setting down an appeal from a county court under these circumstances. On October 12, 1908, a receiving order was made against the debtor in the county court of Halifax on a creditor's petition. On October 31 the appellant and two other creditors of the debtor, claiming to be persons aggrieved by the receiving order, served a notice of appeal against that order on the petitioning creditor and on the official receiver. On November 12 the appellants presented their appeal to the proper officer of the

(1) [1895] A. C. 471. (2) 63 L. J. (Q.B.) 711.

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TAYLOR, *In re.* BOLTON, *Ex parte.*

Bankruptcy Court to be entered for hearing, but were met with the objection that the appeal was out of time on the ground that it ought to have been set down for hearing within the twenty-one days limited by r. 130 of the Bankruptcy Rules, 1886, for bringing an appeal. They now applied that, if necessary, the time for entering the appeal might be extended.

Hansell, for the application. Rule 130 of the Bankruptcy Rules, 1886, provides that, subject to the power of the Court of Appeal to extend the time under special circumstances, no appeal from any order of the Court "shall be brought" after the expiration of twenty-one days from the time at which the order is signed, entered, or otherwise perfected. There is no reported decision on the rule, but on similar words in the Rules under the Bankruptcy Act, 1869, and in r. 1 of Order LVIII. of the Supreme Court Rules, it has been held that an appeal is "brought" when the notice of appeal is served within the time limit: *Ex parte Viney* (1); *Ex parte Saffery* (2); *Christopher* v. *Croll.* (3) It is submitted that the principle of those decisions apply to this case and that the appeal is in time. But if the Court is against me, I ask that the time may be extended. The applicants are willing to abide by any terms the Court may think fit to impose.

Whately, for the respondent, the petitioning creditor. In the first place, the appellants are not parties aggrieved by the receiving order.

[BIGHAM J. I am not going to decide that point on this application, but only the question arising under r. 130.]

Then it is submitted that the appeal is out of time. The appeal ought to have been set down and the security lodged, and the notice of appeal also given, within the twenty-one days. Rules 131 to 134 point to that conclusion. At any rate, no special circumstances for extending the time have been shewn—*In re Vitoria* (4)—and the application should be dismissed.

BIGHAM J. The case of *Christopher* v. *Croll* (3) seems to be a decision in favour of Mr. Hansell's contention. But I have been

(1) (1877) 4 Ch. D. 794.
(2) (1877) 5 Ch. D. 365.
(3) (1885) 16 Q. B. D. 66.
(4) [1894] 1 Q. B. 259.

referred to an unreported case of *In re Dallmeyer* (1), in which the Court of Appeal appear to have decided that the deposit for

(1) *In re* DALLMEYER.

March 30, 1906.

Before Collins M.R., Romer and Cozens-Hardy L.JJ.

In this case notice of appeal against an order of discharge made by the registrar had been served by the bankrupt on the trustee in the bankruptcy, but the appeal had not been entered, within twenty-one days of the signing of the order.

A. Sims, for the bankrupt, applied that the usual deposit for security for costs of the appeal might be dispensed with, and that in case of necessity the time within which the appeal should be entered might be extended

[ROMER L.J. Rule 131 requires you to pay 20*l.* as security for costs.]

The bankrupt is not able to find the money, and has merits.

[COLLINS M.R. I am afraid we cannot do anything for you. The application must be dismissed.

ROMER L.J. The rule says that you shall make your deposit and then give the notice forthwith, but the time has expired.]

The whole question turns upon the meaning of the word "brought" in r. 130. The bankrupt relies on *Christopher* v. *Croll* (16 Q. B. D. 66).

[COLLINS M.R. You have to get the latitude for which you plead out of these Bankruptcy Rules and not out of Order LVIII. Suppose you pay the 20*l.* within three days, is there any objection to entering the appeal?]

F. Mellor, for the trustee. Yes, there are no special circumstances: *In re Vitoria* ([1894] 1 Q. B. 259).

[ROMER L.J. Merely serving notice of appeal is not bringing an appeal. We have no appeal before us.]

A. Sims. The bankrupt gave the usual notice of appeal, and *Christopher* v. *Croll* is in his favour; but the office say that the notice is out of time.

ROMER L.J. They state at the office that they cannot enter the appeal unless the time is extended. If the deposit is paid in three days, let the appeal be set down for next Friday.

COLLINS M.R. Pay the money in three days, the appeal to be entered for hearing next Friday. The applicant must pay the costs of this application.

The order as passed and entered was as follows:—"It is ordered that this application be and it is hereby refused with costs to be taxed and paid by the above-named bankrupt. . . . . And this Court doth further order that if the deposit of 20*l.* be made by or on behalf of the above-named bankrupt, and the appeal be duly entered by him pursuant to the provisions of rule 131 of the Bankruptcy Rules, 1886 and 1890, within three days of this date, the appeal to be in the list for hearing on Friday, the 6th of April, 1906, the time for entering the appeal paying the required deposit and duly serving the respondent with notice of appeal be and it is hereby extended meanwhile."

Solicitors: *Steadman, Van Praagh & Gaylor; Atkinson & Dresser.*

H. L. F.

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TAYLOR, *In re.* BOLTON, *Ex parte.*

Bigham J.

security for costs must be lodged and the appeal entered and the notice of appeal must be given within the twenty-one days. I will extend the time in this case, but only upon terms. The deposit must be lodged and the appeal set down within two days from to-day, and the applicants must pay all the costs of and occasioned by this application.

Solicitors: *Helliwell & Co., for Jubb, Booth & Helliwell, Halifax; Fielder, Fielder & Co., for W. H. Boocock & Sons, Halifax.*

H. L. F.

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July 24; *Oct.* 19.

PREMIER INDUSTRIAL BANK, LIMITED *v.* CARLTON MANUFACTURING COMPANY, LIMITED AND CRABTREE, LIMITED.

Company—Liability upon Bills of Exchange—Bills accepted by Director in Name of Company without Authority in fact—"Person acting under the Authority of the Company"—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 47.

Certain bills of exchange drawn on a limited company were accepted by one of its directors in the company's name, the bills also being signed by the director.

The company received no part of the proceeds of the bills nor any consideration for the acceptances, which, although the director had no fraudulent intention, were in fact in fraud of the company. The plaintiffs were holders in due course of the bills.

Among the objects of the company as defined by its memorandum were the drawing, making, accepting, indorsing, and discounting of bills and promissory notes, and the directors were authorized to delegate any of their powers to committees consisting of such member or members of their body as they thought fit.

Before the date of the acceptances a resolution had been passed by the directors requiring all bills of exchange to be signed by one director and countersigned by the secretary.

In an action against the company as acceptors to recover the amount of the bills:—

Held that, as the director had no authority in fact to accept the bills of exchange, he was not, in accepting them, "acting under the authority of the company" within the meaning of s. 47 of the Companies Act, 1862, and that therefore the company was not liable upon the bills.

ACTIONS tried before Pickford J. and a special jury at the Liverpool Summer Assizes.

The actions (which were consolidated by order) were brought by the plaintiffs, the Premier Industrial Bank, Limited, to recover from the defendants J. & W. Crabtree, Limited, as acceptors, the amounts of two bills of exchange drawn upon them by the defendants the Carlton Manufacturing Company, Limited. The bills were drawn to the order of the Carlton Manufacturing Company, Limited, and indorsed by them to the plaintiffs. The plaintiffs also sued the defendants the Carlton Manufacturing Company, Limited, as drawers of the bills of exchange, but the Carlton Manufacturing Company, Limited, delivered no defence, and judgment was entered against them.

The only question, therefore, was whether the defendants Crabtree, Limited, were liable as acceptors of the bills.

The facts, which are fully stated in the judgment, were shortly as follows:—

The two bills of exchange were accepted by one Thornber, a director of the defendants Crabtree, Limited, in the following terms: "J. & W. Crabtree, Limited. Albert E. Thornber, Director." Crabtree, Limited, had no business dealings with the Carlton Manufacturing Company, Limited. Crabtree, Limited, received no part of the proceeds of the bills, nor any consideration for the acceptances, which, although Thornber had no fraudulent intention, were in fact in fraud of Crabtree, Limited. The jury found that the plaintiffs were holders in due course of the bills.

Among the objects of Crabtree, Limited, as defined by its memorandum of association, were (clause 3 (M)) the drawing, making, accepting, indorsing, and discounting of bills and promissory notes.

Clause 2 of the articles of association was as follows: "In these articles unless the context or subject requires a different meaning . . . . words importing the singular number only shall include the plural and the converse shall also apply."

Clause 84: "The business of the company shall be managed by the directors who . . . . may exercise all such powers of the company as are not by the statutes or by these articles required to be exercised by the company in general meeting . . . ."

By clause 102 the directors were authorized to delegate any

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of their powers to committees consisting of such member or members of their body as they thought fit.

A resolution had been passed on November 20, 1907, before the date of the acceptances, by the directors of Crabtree, Limited, requiring that all bills of exchange should be signed by one director and countersigned by the secretary.

The question was whether, although Thornber had no authority in fact to accept the bills, he was in accepting them "acting under the authority of the company" within the meaning of s. 47 of the Companies Act, 1862 (1), so as to bind Crabtree, Limited.

Lazarus Langdon, K.C., and *Wingate-Saul*, for the plaintiffs. The defendants Crabtree, Limited, are a limited company; therefore the plaintiffs are only affected with notice of what appears in the articles of association, and are not affected with notice of the internal matters discussed and passed by the board of directors. They are not, therefore, affected by the resolution of November 20, 1907: *Biggerstaff* v. *Rowatt's Wharf, Ld.* (2); *Royal British Bank* v. *Turquand*. (3) Under the memorandum and articles of association Thornber had authority to accept these bills. That appears from clause 3 (M) of the memorandum of association and clauses 2, 84, and 102 of the articles of association. Therefore Thornber was "acting under the authority of the company" within the meaning of s. 47 of the Companies Act, 1862. [*County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.* (4), *Mahony* v. *East Holyford Mining Co., Ld.* (5), and *In re Land Credit Co. of Ireland* (6) were also referred to.]

Ashton, K.C., and *Overend Evans*, for the defendants J. & W. Crabtree, Limited. *In re Land Credit Co. of Ireland* (6) is

(1) Companies Act, 1862, s. 47: "A promissory note or bill of exchange shall be deemed to have been made, accepted, or indorsed on behalf of any company under this Act if made, accepted, or indorsed in the name of the company by any person acting under the authority of the company, or if made, accepted, or indorsed by or on behalf or on account of the company by any person acting under the authority of the company."

(2) [1896] 2 Ch. 93.

(3) (1855) 5 E. & B. 248; (1856) 6 E. & B. 327.

(4) [1895] 1 Ch. 629.

(5) (1875) L. R. 7 H. L. 869.

(6) (1869) L. R. 4 Ch. 460.

not an authority in favour of the plaintiffs. The articles of association gave Thornber no authority to indorse these bills. The provision in s. 47 of the Companies Act, 1862, that a bill of exchange shall be deemed to be accepted on behalf of a company if accepted "by any person acting under the authority of the company," applied to the present case, means a person who has conformed to the requirements of the resolution passed at the directors' meeting of November 20, 1907: *In re Cunningham & Co., Ld.* (1); *Peruvian Railways Co.* v. *Thames and Mersey Marine Insurance Co.* (2)

Lazarus Langdon, K.C., in reply.

Cur. adv. vult.

Oct. 19. The following judgment was delivered by

PICKFORD J. These actions, which were consolidated and were tried before me on circuit, were brought upon two bills of exchange, dated respectively January 14 and February 14, 1908, which were drawn by the Carlton Manufacturing Company, Limited, the signature being that of Mr. Walton, director of that company, and accepted payable at the Union of London and Smiths Bank, Limited, by "J. & W. Crabtree, Limited. Albert E. Thornber, Director." The question is whether the acceptors, J. & W. Crabtree, Limited, are liable upon the bills under the circumstances of the case. The bills were drawn and accepted for the accommodation of Mr. Walton, a director of the Carlton Manufacturing Company, Limited, and Mr. Thornber, a director of J. & W. Crabtree, Limited, who signed the acceptances in the terms I have read. That was the statement made by Mr. Thornber, who was called as a witness for the defendants. There had been no transactions between the two companies; there was no consideration whatever to J. & W. Crabtree, Limited, for the bills, and they received no part of the money, all of which went to Mr. Walton or to Mr. Thornber; and there is no doubt that the bills were accepted in fraud of the company. It is quite true that Mr. Thornber did not mean to defraud the company; he meant to meet the bills when they fell due; but none the less it was a fraud on the company. The question is whether under the

(1) (1887) 36 Ch. D. 532. (2) (1867) L. R. 2 Ch. 617.

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circumstances the company is liable. It was suggested that, as the bills were accepted by the signature of one director only and there was no counter-signature by the secretary, and also because of the circumstances of the case, the plaintiffs had notice of some infirmity in the bills, and therefore they could not recover; but, as the jury found that the plaintiffs gave value in good faith for the bills, this point is out of the case. The question resolves itself into one of law, namely, whether, under the circumstances, the company is liable. That turns upon whether the case comes within s. 47 of the Companies Act, 1862. These bills were accepted in the name of the company, and therefore the question narrows itself down to this, namely, whether Mr. Thornber was a person acting under the authority of the company. That does not mean authorized by the company to accept these particular bills. If it did, no question could arise. Was Mr. Thornber a person "acting under the authority of the company" to accept the bills for it? On behalf of the defendants Crabtree, Limited, it was said that he was not. For the plaintiffs it was contended that he was. In order to deal with this I have to look at the memorandum of association of the company. Clause 3 says this: "The objects for which the company is established are . . . . (M) To draw make accept indorse discount execute and issue promissory notes bills of exchange bills of lading warrants debentures and other negotiable or transferable instruments." Therefore one of the objects of the company certainly was to draw and accept bills. By whom they were to be accepted or drawn, as the case might be, seems to depend upon the articles of association of the company. The first clause of the articles that I think it is necessary to refer to is clause 81, which provides that Mr. Thornber is to be one of the first three directors of the company. There is thus no doubt that Mr. Thornber was a director of the company. Then clause 84 says this: "The business of the company shall be managed by the directors who may pay all expenses incurred in getting up and registering the company and may exercise all such powers of the company as are not by the statutes or by these articles required to be exercised by the company in general meeting subject nevertheless to any regulations of these articles

to the provisions of the statutes and to such regulations (being not inconsistent with the aforesaid regulations or provisions) as may be prescribed by the company in general meeting but no regulation made by the company in general meeting shall invalidate any prior act of the directors which would have been valid if such regulation had not been made." Clause 85: "Without prejudice to any of the powers by these articles or by law conferred upon the directors it is hereby declared that they shall have the following powers, viz.:— . . . . (E) To enter into negotiations and agreements or contracts (preliminary conditional or final) and to give effect to modify vary or rescind the same." Clause 99: "The directors may meet together for the despatch of business adjourn and otherwise regulate their meetings as they think fit and determine the quorum necessary for the transaction of business. Until otherwise determined two directors shall be a quorum. Questions arising at any meeting shall be decided by a majority of votes. In case of an equality of votes the chairman shall have a second or casting vote. A director may at any time summon a meeting of the directors. It shall not be necessary to give any notice of a meeting of directors to any director who is absent from the United Kingdom." Clause 102: "The directors may delegate any of their powers to committees consisting of such member or members of their body as they think fit; any committee so formed shall in the exercise of the powers so delegated conform to any regulations that may be imposed on him or them by the directors. The regulations herein contained for the meetings and proceedings of directors shall so far as not altered by any regulations made by the directors apply also to the meetings and proceedings of any committee. The chairman of the board shall be ex officio a member of all committees." Clause 103: "All acts done by any meeting of the directors or of a committee of directors or by any person acting as a director shall notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such director or person acting as aforesaid or that they or any of them were disqualified be as valid as if every such person had been duly appointed and was qualified to be a director."

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So far as I can see, these are the only provisions of the memorandum and articles which bear upon the matter. There was a resolution dated November 20, 1907, of the directors of the defendant company requiring that all bills of exchange should be signed by one director and countersigned by the secretary. Mr. Thornber said that he drew the attention of Mr. Walton, the drawer, to that resolution, and pointed out that for him to accept the bills would be contrary to it, but he added that he accepted them in the name of the company because he could discount the company's bills, but not his own. Under these circumstances Mr. Thornber was certainly not in fact authorized to draw or accept bills in the form in which these bills were accepted. Whether he was a person "acting under the authority of the company" within the meaning of s. 47 of the Companies Act, 1862, is the question I have to decide. On behalf of the defendants Crabtree, Limited, it was contended that Mr. Thornber had no authority in fact, and that therefore he was not acting under the authority of the company. For the plaintiffs it was contended that Mr. Thornber must be taken to be a person acting under the authority of the company, because the memorandum and articles of association shewed that it was possible that he might have been constituted a committee of one, and that to him might have been delegated the duty of accepting bills on behalf of the company, and it was urged that the authorities shew that under those circumstances the company must be taken to be bound by his act. In support of that contention I was referred to several cases the gist of which is, I think, practically summed up in the judgment of Lord Halsbury in *County of Gloucester Bank* v. *Rudry Merthyr Steam and House Coal Colliery Co.* (1) Lord Halsbury said: "Persons dealing with joint stock companies are bound to look at what one may call the outside position of the company—that is to say, they must see that the acts which the company is purporting to do are acts within the general authority of the company, and if those public documents, which every one has a right to refer to, disclose an infirmity in their action, they take the consequences of dealing with a joint stock company which has

(1) [1895] 1 Ch. 629

apparently exceeded its authority. But the case here is exactly the other way. All the public documents with which an outside person would be acquainted in dealing with the company would only shew this, that by some regulations of their own, what Lord Hatherley described as their indoor management, they were capable, if they had thought right, of making any quorum they pleased; and an outside person knowing that, and not knowing the internal regulation, when he found a document sealed with the common seal of the company and attested and signed by two of the directors and the secretary, was entitled to assume that that was the mode in which the company was authorized to execute an instrument of that description." I may say that the instrument there was a mortgage. Lord Halsbury then continued: "It turns out that their own internal regulation was that the number of directors should exceed two. But that is a matter which was known to them and to them alone. The only external fact with respect to the management of the company of which an outside person would be cognisant would be that they had power to make any quorum they pleased, and I think he would be entitled to assume that the proper quorum had been properly summoned, and had attended, to effect the completion of that instrument." In that case, although the instrument was only executed by two of the directors, whereas the quorum was three, the company was held bound by the act of the two directors. In another case, *Biggerstaff* v. *Rowatt's Wharf, Ld.* (1), a somewhat similar question arose. In that case there was a hypothecation of debts effected by the managing director without, it was said, the authority of the company, but, as the articles of association contained a provision under which the directors might delegate any of their duties to the managing director, the company was held to be bound. In his judgment in that case Lindley L.J. said: "Now, what is the law as to this point? What must persons look to when they deal with directors? They must see whether according to the constitution of the company the directors could have the powers which they are purporting to exercise. Here the articles enabled the directors to give to the managing director all the powers of the directors except as to drawing, accepting, or

(1) [1896] 2 Ch. 93.

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indorsing bills of exchange and promissory notes. The persons dealing with him must look to the articles, and see that the managing director might have power to do what he purports to do, and that is enough for a person dealing with him bona fide. It is settled by a long string of authorities that, where directors give a security which according to the articles they might have power to give, the person taking it is entitled to assume that they had the power." Those cases are, of course, binding upon me, and I have no wish to act contrary to them, but they were not decisions which dealt with this section of the Act of 1862. That point came before the Court in another case to which I was referred, namely, *In re Land Credit Co. of Ireland.* (1) In his judgment in that case Selwyn L.J. said: "To ascertain the law applicable to such a matter we must first look to the Companies Act, 1862. It is prescribed in s. 47 of the Act that 'a promissory note or bill of exchange shall be deemed to have been made, accepted, or indorsed on behalf of any company under this Act, if made, accepted, or indorsed in the name of the company by any person acting under the authority of the company, or if made, accepted, or indorsed by or on behalf or on account of the company by any person acting under the authority of the company.' The question still remains, who is properly to be considered a person acting under the authority of the company, and that matter, I think, has been settled by the several decisions to which reference has been made, the effect of which is very concisely and clearly summed up by the present Lord Chancellor (Lord Hatherley) in *Fountaine* v. *Carmarthen Ry. Co.* (2) His Lordship says: 'In the case of a registered joint stock company, all the world, of course, have notice of the general Act of Parliament, and of the special deed which has been registered pursuant to the provisions of the Act, and if there be anything to be done which can only be done by the directors under certain limited powers, the person who deals with the directors must see that those limited powers are not being exceeded. If, on the other hand, as in the case of *Royal British Bank* v. *Turquand* (3), the directors have power and authority to bind the company, but certain

(1) L. R. 4 Ch. 460. (2) (1868) L. R. 5 Eq. 316.
(3) 5 E. & B. 248; 6 E. & B. 327.

preliminaries are required to be gone through on the part of the company before that power can be duly exercised, then the person contracting with the directors is not bound to see that all these preliminaries have been observed. He is entitled to presume that the directors are acting lawfully in what they do. That is the result of Lord Campbell's judgment in *Royal British Bank* v. *Turquand*.' (1) That case of *Royal British Bank* v. *Turquand* (1) may now, I think, be considered as a leading authority applicable to cases of this description, and, so far as I am aware, it has never been questioned." In *In re Land Credit Co. of Ireland* (2) the chairman, who had accepted a bill, was authorized to accept bills drawn on the company by one L. upon L.'s depositing securities to a certain amount. The chairman's act had been ratified by the other directors, and the question was whether the condition upon which his right to accept the bills as between himself and the company had been fulfilled. It was held that the person who took the bills in good faith was not obliged to see that such condition had been performed. There was no question of his authority. On those decisions, does this case come within the words "acting under the authority of the company"? I think the words of the section "if accepted by any person acting under the authority of the company" must mean something more than a person who might by a certain delegation of power given to him have been authorized and have been thus acting under the authority of the company. I think the section contemplates some one who is in fact acting under the authority of the company to accept bills, and as Mr. Thornber in this case was not, I do not think that the company is bound by his acceptances. The defendants Crabtree, Limited, are therefore entitled to succeed.

Judgment for defendants Crabtree, Limited.

Solicitors for plaintiffs: *Hall, Son & Hawkins, Manchester.*
Solicitor for defendants: *S. Crossley, Blackburn.*

(1) 5 E. & B. 248; 6 E. & B. 327. (2) L. R. 4 Ch. 460.

J. E. A.

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Oct. 28;
Nov. 2.

LONDON COUNTY COUNCIL *v.* METROPOLITAN RAILWAY COMPANY AND OTHERS.

Metropolis—General Line of Buildings—Buildings erected beyond the General Line—Consent of the Metropolitan Board of Works—Alteration of General Line of Buildings—Metropolis Management Amendment Act, 1862 (25 & 26 *Vict.* c. 102), *s.* 75 (*repealed*)—*London Building Act*, 1894 (57 & 58 *Vict.* c. *ccxiii.*), *ss.* 22, 27, 216.

The superintending architect of metropolitan buildings appointed under s. 136 of the London Building Act, 1894, in defining the general line of buildings under s. 22 of that Act, may take into account structures actually existing which were erected before the passing of that Act, with the consent of the Metropolitan Board of Works, beyond the general line of buildings as it existed at the date of the consent. The erection of such structures may have had the effect of altering the general line of buildings as it existed at that date. The question whether it has done so is a question of fact for the superintending architect or other tribunal which has to decide it.

The superintending architect was called upon to define the general line of buildings in a part of a certain road in the metropolis in the following circumstances:—Along the part of the road in question stood a number of old houses built before the year 1862. In front of these houses and between them and the pavement line of the road were originally forecourts or open spaces. By s. 75 of the Metropolis Management Amendment Act, 1862 (now repealed by the London Building Act, 1894, and replaced by ss. 22 and 170 of that Act), it was provided that no structure should without the consent in writing of the Metropolitan Board of Works be erected beyond the general line of buildings or within fifty feet of the highway; and any structure erected without such consent was liable to be demolished as therein provided. At the date of the application to the superintending architect there had been erected upon the forecourts or open spaces in front of the old houses a number of shops of one storey projecting from the fronts of the old houses up to the pavement line of the road in question. Some of these shops had been erected with the consent of the Metropolitan Board of Works; as to one of them it was proved that the consent of the board had been applied for and refused, and as to the others there was no evidence that the consent of the board had ever been applied for or granted.

The superintending architect certified that the frontage line of the old houses was the general line of buildings. On appeal from this decision under s. 25 of the London Building Act, 1894, to the tribunal of appeal constituted under s. 175 of the Act, that tribunal fixed as the general line of buildings the frontage line of the shops erected on the forecourts or open spaces in front of the old houses.

On a case stated for the opinion of the High Court under s. 182 of the Act:—

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Held, that there was nothing in point of law in these circumstances to prevent the tribunal of appeal from so deciding.

By s. 27 of the London Building Act, 1894, the consent of the London County Council to the erection of any structure beyond the general line of buildings in any part of a street shall not be deemed to affect or alter in that or any other part of the street the general line of buildings as existing at the time of the consent.

By s. 216 of the Act all consents given under any Act repealed by that Act are to have the same validity and effect as if they had been given under that Act:—

Held, that the effect of s. 216 was to legalize buildings erected by consent of the Metropolitan Board of Works under the Metropolis Management Amendment Act, 1862, but not to alter the effect which the erection of buildings in accordance with the consent of the board might have upon the general line of buildings as existing at the date of the consent.

CASE stated under s. 182 of the London Building Act, 1894, by the tribunal of appeal constituted by s. 175 of the Act on an appeal to them from the certificate of the superintending architect of metropolitan buildings.

On April 7, 1907, application was made on behalf of the Rev. James Fleming and others, trustees of the United Kingdom Temperance and General Provident Institution, as the owners of the messuages and premises situate and being 153, 155, 157, 159, 161, 163, and 165, Euston Road, in the borough of St. Pancras, in the county of London, in pursuance of s. 22 of the London Building Act, 1894, to the superintending architect of metropolitan buildings to define the general line of buildings in respect of the above-mentioned messuages and premises, the same lying between Mabledon Place and Duke's Road on the south side of Euston Road.

Along that side of the road between the east side of Duke's Road and the west side of Mabledon Place, a distance of 420 feet, stood a row of old houses erected before the year 1862. In front of all these old houses, which are hereinafter called the main buildings, there were, at the time when they were erected, forecourts or open spaces between the fronts of the main buildings themselves and the pavement line of the highway.

At the date of the application to the superintending architect there had been built upon the forecourts or open spaces in front of most of the main buildings and projecting out from the main

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buildings up to the pavement line a number of shops, namely, one shop of two storeys numbered 119 and 121, Euston Road, and several shops of one storey numbered, in odd numbers, 123 to 135, 141 to 153, 167, and 169, Euston Road. All these shops were substantially constructed and of many years' standing.

Euston Road was constructed under certain local Acts of Parliament referred to in and consolidated by the statute 7 Geo. 4, c. cxlii. The line of main buildings on the south side between Duke's Road and Mabledon Place complied with the provisions of s. 140 of that statute. That section was repealed by the Metropolis Management Amendment Act, 1862, and replaced by s. 75 of that Act. (1)

With regard to the shops erected upon the forecourts or open spaces in front of the main buildings, as to those numbered 133, 135, 145, 147, 149, and 151, containing an aggregate frontage of 110 feet, the consent of the Metropolitan Board of Works had been duly applied for and obtained in accordance with s. 75 of the Metropolis Management Amendment Act, 1862, the consent having been obtained at various dates between the years 1864 and 1880. Consent was given in respect of each of these shops on condition that it should be of one storey and that it should not be at any time or in any manner altered or raised without the consent of the Metropolitan Board of Works, and in respect of the shops numbered 133, 135, 145, and 151 on the further condition that certain land should be surrendered.

Application for consent to the erection of a temporary structure upon the forecourt or open space in front of the main building numbered 139 had been made to the Metropolitan Board of Works and refused. The shop numbered 153 was built before any application was made for consent; consent was subsequently applied for and refused on April 28, 1876.

As to the shops numbered 119, 121, 123, 125, 127, 129, 131, 141, 143, 167, and 169 there was no evidence as to how or when they had been erected; the only evidence as to these was that the chief clerk of the superintending architect's department, who had been employed for forty years in that department under the Metropolitan Board of Works and under the London County

(1) See note on p. 130, post.

Council consecutively, had searched through all the records in the possession of the London County Council and had been unable to find any record of a consent given to the erection of any of those shops. The same witness had searched for and found records of the consents and refusals mentioned above The shops numbered 119, 121, 123, 125, 127, 129, 131, 141, 143 153, 167, and 169 contained an aggregate frontage of 171 feet. The remaining portion of the frontage, that is to say, 139 feet, was vacant.

The superintending architect duly gave notice to all persons interested, including the Metropolitan Railway Company as freeholders of 123, 125, 127, and 129, Euston Road, to attend the inquiry held by him for the purpose of defining the general line of buildings at the said portion of Euston Road, and the persons interested attended the inquiry and were heard by the superintending architect, who made his certificate on May 10, 1907, and thereby certified that the fronts of the main buildings numbered in odd numbers 125 to 151 and 153 to 169 inclusive, together with the northern flank of No. 1, Mabledon Place and the northern main flank of No. 17, Duke's Road, formed the general line of buildings on the south side of Euston Road between Duke's Road and Mabledon Place.

The certificate of the superintending architect being duly made and issued, notice thereof was duly served on the Metropolitan Borough Council of St. Pancras and on all interested persons, whereupon the Metropolitan Railway Company and the Rev. James Fleming and others (hereinafter called the respondents) did on May 23, 1907, duly serve notice of appeal against the said certificate to the tribunal of appeal under s. 25 of the London Building Act, 1894, and in pursuance of the regulations made by the tribunal of appeal under s. 184 of the Act.

The appeals were heard together by consent of the parties on June 11, 1907.

No evidence was given of any prosecutions or intended prosecutions in respect of any of the shops erected as aforesaid on the forecourts or open spaces in front of the main buildings or of any attempt to obtain the removal of the said shops or any of them, and no request was made to adjourn the hearing of the

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appeal pending any prosecution or attempt to procure the removal of the shops. There was no evidence as to whether or not any of them were built upon old foundations.

The respondents contended that the duty of the superintending architect and of the tribunal of appeal was to define what was in fact the general line of buildings; that as the said shops were in existence at the date of the superintending architect's certificate and of the hearing of the appeal before the tribunal of appeal, that tribunal were entitled to take their position into account in defining the present line of buildings, and that the circumstances under which they came into existence, and the facts that some of them were erected without consent and that others were consented to upon conditions, might be disregarded, and did not prevent the superintending architect or the tribunal of appeal from taking into account the position of the shops in defining the general building line; and, further, that those which had been erected by consent, and those in respect of which there was no evidence as to whether they were erected with or without consent, must be presumed to be lawfully in existence.

The London County Council contended that the general line of buildings between Duke's Road and Mabledon Place was correctly determined by the superintending architect to be the line of fronts of the main buildings hereinbefore referred to, and that the superintending architect and the tribunal of appeal were entitled to and ought in law to consider the circumstances affecting the erection of the shops hereinbefore described, and, if the circumstances shewed that they were either unlawful, as having been erected without the consent or notwithstanding the refusal of the Metropolitan Board of Works, or lawful only as existing by the consent of the Metropolitan Board of Works under the conditions above set forth, the superintending architect and the tribunal of appeal should disregard the existence of such structures in determining the general line of buildings. It was not contended that these shops were not buildings.

The tribunal of appeal allowed the appeal and varied the certificate of the superintending architect and determined that the general line of buildings was the frontage line of the shops

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erected as aforesaid upon the forecourts or open spaces in front of the main buildings.

In arriving at their decision the tribunal of appeal first took into account all the buildings which they found on the site, excluding only from consideration the temporary structure numbered 139, and came to the conclusion above stated. They then considered the question excluding from consideration the shop numbered 153, in respect of which consent had been refused by the Metropolitan Board of Works, and which, it was contended, was unlawfully erected; and, so considering the question, they came to the same conclusion. The tribunal were in doubt as to whether they ought to exclude No. 153 from consideration, but its exclusion did not affect their decision. It was not contended that the shops numbered 133, 135, 145, 147, 149, and 151 were not lawfully erected, and, if and so far as it was necessary for their decision, the tribunal of appeal were of opinion that those structures and the shops numbered 119, 121, 123, 125, 127, 129, 131, 141, 143, 167, and 169 were lawfully in existence.

The London County Council, being dissatisfied with the determination of the tribunal of appeal as being erroneous in point of law, applied to the tribunal under s. 182 of the London Building Act, 1894, to state and sign a case for the opinion of the High Court, setting forth the facts and the grounds of the determination and order of the tribunal of appeal. A special case was accordingly stated in which the foregoing facts were set out.

The question for the Court was whether the tribunal of appeal had come to a right determination in point of law in the circumstances.

C. A. Russell, K.C., and *Bodkin*, for the London County Council. The frontage line of the main buildings is the only true building line in this part of Euston Road; the superintending architect was right in so determining, and the tribunal of appeal were wrong in deciding that it was the frontage line of the shops erected on the forecourts or open spaces in front of the main buildings. There can be no doubt that originally the building line was along the frontage of the main buildings. By the

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statute 7 Geo. 4, c. cxlii., s. 140 (1), any building erected within fifty feet from the side of the road was to be deemed a common nuisance. By s. 143 of the Metropolis Management Act, 1855, no building was without the consent in writing of the Metropolitan Board of Works to be erected beyond the regular line of buildings in the street in case the distance of the line of buildings from the highway did not exceed thirty feet, or within thirty feet of the highway where the distance of the line of buildings therefrom amounted to or exceeded thirty feet; and any building erected contrary to this enactment was liable to be demolished or set back by the vestry or district board. These two enactments were repealed by s. 75 of the Metropolis Management Amendment Act, 1862, and in lieu thereof it was enacted that no building, structure, or erection should without the consent in writing of the Metropolitan Board of Works be erected beyond the general line of buildings in any street in case the distance of the line of buildings from the highway did not exceed fifty feet, or within fifty feet of the highway when the distance of the line of buildings therefrom amounted to or exceeded fifty feet. By this section the building line was to be decided by the superintending architect to the Metropolitan Board of Works. In case any building, structure or erection were erected without the consent in writing of the Metropolitan Board of Works the vestry were empowered to make complaint to a justice of the peace, who was thereupon directed to issue a summons to the owner, occupier, or builder of the premises; if the complaint was proved the justice might order the demolition of the building, and if this order was not obeyed the vestry were directed to demolish the building or erection complained of.

If the legislation on this subject had ceased there, these shops erected in front of the main buildings and projecting up to the pavement line of the highway could never have had any effect upon the building line, because if they had been erected before the Act of 1855 they would be a common nuisance under the Act of 7 Geo. 4, c. cxlii., s. 140; and if they had been erected after the Act of 1855 without the consent of the Metropolitan Board of Works they would be unlawful structures liable to be

(1) See note on p. 130, post.

demolished, while if they were erected with the consent of that body, inasmuch as that consent justified their erection beyond the building line, it would follow that they could not themselves form part of the building line.

So the case would have stood if the London Building Act, 1894, had not been passed. That Act does not improve, but rather weakens, the position of these shops. Sect. 22, sub-s. 1, of that Act provides, in terms similar to those of s. 75 of the Metropolis Management Amendment Act, 1862, that no building or structure shall without the consent in writing of the London County Council be erected beyond the general line of buildings in case the distance of the line of buildings from the highway does not exceed fifty feet, or within fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet. As in the earlier Act, the general line of buildings shall, if required, be defined by the superintending architect. So far the effect of the two enactments is for the present purpose identical. If these shops could not under the Act of 1862 be taken into account in defining the general line of buildings, neither can they under s. 22, sub-s. 1, of the London Building Act, 1894. By sub-s. 2 of s. 22 of the later Act the section is not to apply to any building or structure erected after the Act on land which at the date of the Act or within seven years previously is or has been lawfully occupied by a building or structure. The tribunal of appeal have based their decision partly upon the ground that the land on which these shops were erected was land lawfully occupied by buildings. As to the shops which were erected without consent, the land on which they stand is not lawfully occupied by them: *Scott* v. *Carritt*. (1) But even if structures are to be taken as lawful where there is no evidence of the terms on which they were erected, this anomalous result will follow if the decision of the tribunal of appeal is right, namely, that those shops erected by the consent of the Metropolitan Board of Works on the terms that they should not be altered or raised without the permission of that authority must for ever remain one-storeyed shops unless that permission is obtained, while others erected either by unconditional consent or without any evidence

(1) (1900) 82 L. T. 67.

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of consent at all may be raised to any height their owners may choose. This anomaly points to the conclusion that structures erected by the consent, absolute or conditional, of the Metropolitan Board of Works were not intended by the Legislature to form part of the building line.

Further, s. 27 of the London Building Act, 1894, contains an express provision that the consent by the London County Council to the erection of any building or structure beyond the general line of buildings shall not be deemed to affect or alter the general line of buildings as existing at the time of such consent. This is a clear indication as to what was the intention of the Legislature with regard to consent given under the earlier statutes; and this indication is made more pointed by s. 216, which provides that all consents given under any Act repealed by the London Building Act, 1894, shall be of the same validity and effect as if they had been given under that Act; in other words, a consent given under the Metropolis Management Amendment Act, 1862, is not to be deemed to affect or alter the general line of buildings as existing at the time the consent was given.

If the decision of the tribunal of appeal is right, it must follow that the Metropolitan Board of Works, when asked for consent to the erection of a structure beyond the general building line, were put by the Legislature in the impracticable position of having either to refuse their consent or, by consenting, to lose control over a substantial part of the street.

Macmorran, K.C., and *R. Cunningham Glen*, for the Metropolitan Railway Company. It is no part of the superintending architect's duty to inquire into the history of the buildings when called upon to define their general line. He is not the tribunal to decide whether they are lawfully or unlawfully upon the land they occupy. With the construction of the Act of 7 Geo. 4, c. cxlii., or the Metropolis Management Acts he has nothing to do. His duty is to define the general line of the buildings as he finds them.

But even assuming it to be the duty of the superintending architect to regard the legal status of the buildings whose general line he is to define, then, as to the greater number of the shops in question, there is no evidence as to how they came

to be erected. They are permanent structures intended to remain, and must be presumed to be lawfully occupying the land on which they stand.

If the argument for the London County Council is sound, it must follow that the general line of buildings could never have changed whether buildings had been brought forward with or without the consent of the Metropolitan Board of Works. This is not the general impression. There is nothing in any statute to prevent the general line of buildings from varying as circumstances change; all that is necessary to bring about this change is that the Metropolitan Board of Works should in time past have given their consent to the erection of a sufficient number of structures in advance of the general line of buildings as it existed at the time when their consent was given.

Sect. 216 of the London Building Act, 1894, cannot have the effect claimed for it by counsel for the London County Council, a retrospective effect which would be both unnecessary and inconvenient, and one which would in many cases alter the de facto building line and lay down a statutory and fictitious line which is not the actual line of buildings. The effect of the section is merely that of a saving clause preserving the effect of by-laws, regulations, orders, consents, conditions, and notices duly made, given, imposed, or issued under any Act repealed by the London Building Act, 1894.

Simon, K.C., and *Cecil Walsh*, for the respondents the Rev. James Fleming and others, adopted the argument for the London County Council.

C. A. Russell, K.C., in reply.

LORD ALVERSTONE C.J. In this case we are asked to overrule the decision of the tribunal of appeal constituted under the London Building Act, 1894, and consisting of three members, one, commonly a barrister, appointed by a Secretary of State, another appointed by the council of the Royal Institute of British Architects, and the third appointed by the council of the Surveyors' Institution. The question arises in this way: The superintending architect had found the general line of buildings to be the front of certain old houses in the Euston Road. The

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tribunal of appeal have found it to be the front of certain shops which exist upon the forecourts or open spaces in front of those old houses. From that decision there is an appeal by way of special case to this Court.

We must decide this case on the facts before us, and not allow our minds to be influenced by what has been done in the case of other streets, or by our own view of what might have been done in the present case. The question is, Ought we to interfere with the decision of the tribunal of appeal? I think we ought not. We must consider the state of things upon which the superintending architect and the tribunal of appeal were called upon to decide. There was on the south side of Euston Road, just east of St. Pancras' Church, a number of old houses, some of which have existed in their present condition since the year 1855; but between Duke's Road and Mabledon Place there have been considerable alterations since that date. The question in the present case arises as to some sixteen structures numbered, in odd numbers, from 123 to 135 and from 141 to 153 inclusive, and 167 and 169, all on the south side of Euston Road. The facts with regard to the erection of these structures are stated in the special case.

We cannot say that the tribunal of appeal have gone wrong in any point of law. They found before them a road containing a number of shops, of which some must be taken to be lawfully there, while as to others there is no evidence that they are there unlawfully. Mr. Russell contended that they are there unlawfully because they are built less than fifty feet from the roadway in contravention of s. 140 of the statute 7 Geo. 4, c. cxlii. But it is for Mr. Russell to shew that they are unlawful, whereas the only evidence before the Court is that they have existed as they are for many years. There is no suggestion of any intention to pull them down or to restore the front of the old houses as the building line. Under these circumstances it was not for the tribunal of appeal, or for this Court on appeal from them, to assume that the structures are unlawful. It may be that the proper inference is that they were erected with the consent of the proper authority, given on terms similar to those imposed in other cases; but even if no such inference is to be drawn, I think

the tribunal of appeal must deal with the case as they find it. They found a large number of permanent buildings occupying the greater part of the space in question and forming of themselves a line of buildings. In fact considerably more than half the distance along which the building line in question (wherever it may be) extends is covered by structures standing and intended to remain standing, as to which the only adverse remark to be made is that some of them are known to have been erected by the consent of the Metropolitan Board of Works upon the terms that they should not exceed a certain height, and that as to others there is no evidence that that authority ever consented to their erection. Then when the tribunal of appeal, having this state of things before them, decide that the general building line is the frontage of these structures, can we say that they have gone wrong in point of law?

It is argued that in fixing the general building line the existence of these structures ought to be excluded from consideration. The course of legislation, it is said, points clearly to that conclusion. First there is the Act of 7 George IV., which prohibited any building within fifty feet from the roadway; then came the Metropolis Management Act, 1855, which did not indeed expressly repeal the Act of George IV., but required the consent of the Metropolitan Board of Works for buildings within thirty feet of the roadway. Then in the year 1862 s. 140 of the Act of George IV. and s. 143 of the Act of 1855 were repealed and s. 75 of the Act of 1862 was enacted. That section enabled the Metropolitan Board of Works to consent to the erection of buildings within fifty feet. Now it seems to me that, once the board had given their consent to the erection of a building, the building erected in pursuance of that consent was lawfully erected, and that buildings so erected might or might not have the effect of altering the building line as it stood before their erection. Whether they had that effect or not would be the question which the tribunal had to decide; and I cannot accede to Mr. Russell's argument that buildings, erected with the consent of the Metropolitan Board of Works beyond the building line as it existed at the time when the consent was given, could not as a matter of law affect or alter the building

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line. In my view any tribunal which had to deal with the regular building line under the Act of 1855, or the general line of buildings under s. 75 of the Act of 1862, would have to take into consideration the existence in fact of structures as to which the consent of the Metropolitan Board of Works had been given.

Then is there anything in the London Building Act, 1894, which prevents the tribunal of appeal from taking such structures into consideration? Sect. 22 of that Act re-enacted the prohibition against building without consent beyond the general line of buildings or within fifty feet of the highway in any street. Sub-s. 2 of that section is not unimportant, though it does not directly bear on the question before the Court. It provides that "This section shall not apply to any building or structure erected after the commencement of this Act upon land which either at the commencement of this Act or at any time within seven years previously has or shall have been lawfully occupied by a building or structure." That proviso shews an intention to protect lawful buildings. There is nothing in that sub-section to exclude buildings or structures of one storey, or to say that a sufficient number of such buildings or structures might not alter or affect the general building line.

I come next to s. 27. It is in these terms: "The consent by the council to the erection of any building or structure beyond the general line of buildings in any part of a street or the erection of such building or structure shall not be deemed to affect or alter in that or any other part of the street the general line of buildings as existing at the time of such consent." In my opinion that does not apply to any building or structure erected before the Act. It is a very wise and proper provision inserted to prevent this point arising with reference to buildings subsequently erected with the consent of the London County Council. After the passing of the Act the consent of the council to the erection of buildings is not to affect or alter the general line of buildings. Then it was argued that by virtue of s. 216 consent given before the Act is to have the same effect as a consent given since the Act has under s. 27, and that buildings erected with the consent of the Metropolitan Board of Works before the Act of 1894 are not to alter or affect the general line of buildings

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as existing at the time of the consent any more than buildings erected with the consent of the London County Council after the Act are to alter or affect the general line of buildings as existing at the time of that consent. To give that meaning to the section is to attribute to it a retrospective operation of a strange and arbitrary character. The words of s. 216 are "All bye-laws regulations orders consents conditions and notices duly made given imposed or issued under any Act hereby repealed shall so far as applicable be of the same validity and effect as if they had been made given imposed or issued under this Act. . . . ." In my view all that the section intends is to save alive any by-laws and to preserve for any buildings erected by consent given before the Act the character of buildings lawfully erected. It would be a forced construction of the section to hold that besides preserving the legalizing virtue of a consent given before the Act it has the additional effect of preventing a building lawfully erected from having any influence upon the general building line. In my opinion s. 216 is a general section intended to preserve the effect of a consent given before the Act, as it preserves the validity of by-laws and regulations made before the Act, but not to annul any effect which a consent given before the Act might ultimately have in altering or affecting the general line of buildings as it existed when the consent was given. For these reasons I cannot say that the tribunal of appeal have come to a wrong conclusion in fixing the general line of buildings, as they have fixed it, at the frontage line of these shops. This appeal must therefore be dismissed.

WALTON J. I agree for the reasons which have been stated by my Lord, but I wish to add a few words upon one point which occurs to me. Mr. Russell contends that before the Act of 1862 there was a general line of buildings on the south side of Euston Road between Duke's Road and Mabledon Place, namely, the line formed by a row of old houses along that side of the road. As I understand his argument it really involves this, that that line, having once become, must for ever afterwards remain the general line of buildings, no matter what may have subsequently happened.

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The difficulty I feel about that argument is that it leads to the conclusion that the old building line must remain the building line, even if the Metropolitan Board of Works, or other authority, whatever it might be, had given their consent to the erection of buildings without any conditions up to the line of the present frontage of the one-storeyed shops. If the whole frontage had been brought forward with the unconditional consent of the Metropolitan Board of Works, the conclusion from Mr. Russell's argument would be just the same, namely, that the general line of buildings would not be the line of frontage of the new buildings, but would be still the line of frontage of the old buildings. I cannot agree with that conclusion. It cannot be that that was the intention of the Legislature. The superintending architect and the tribunal of appeal have to look at the road and the buildings as they exist, and to find out from those data what is the general line of buildings. This the tribunal of appeal have done, and I see no reason to interfere with their decision.

Appeal dismissed.

Solicitor for the London County Council: *Edward Tanner.*

Solicitor for the Metropolitan Railway Company: *C. de W. Kitcat.*

Solicitors for the Rev. James Fleming and others: *Francis Howse & Eve.*

NOTE.—7 Geo. 4, c. cxlii., s. 140: "No building whatsoever shall be erected on any new foundation, by any person or persons whomsoever, upon any of the lands adjacent to the road leading from the Edgeware Road near Paddington, to the Great Northern Road in Islington, (which road is partly described in the fifth and partly in the eighth part of the said first schedule hereto annexed,) and from the north end of Great Portland Street to such road, within fifty feet from the side of the said road, other than such toll houses and watch houses as shall or may be erected or continued by virtue of this Act (and other than and except houses or buildings to be erected upon any part of the north side of the road extending eastward from a lane called Maiden Lane to the gate called The Bell Gate, both in Battlebridge in the county of Middlesex); and no part of the said roads shall be paved, except under the powers and provisions of this Act; and if any building shall be so erected, or any pavement laid down on the said roads or either of

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them, contrary to the true intent and meaning of this Act, the same shall be deemed common nuisances."

The Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 143: "No building shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the regular line of buildings in the street in which the same is situate, in case the distance of such line of buildings from the highway do not exceed thirty feet, or within thirty feet of the highway where the distance of the line of buildings therefrom amounts to or exceeds thirty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway; and in case any building be erected contrary to this enactment, it shall be lawful for the vestry or district board in whose parish or district such building is situate to cause the same to be demolished or set back (as the case may require), and to recover the expenses incurred by them from the owner of the premises in manner provided by this Act."

The Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), s. 75: "The one hundred and forty-third section of the first recited Act [the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120)], and the one hundred and fortieth section of the Act passed in the seventh year of His Majesty King George the Fourth, chapter one hundred and forty-two, intituled an Act for consolidating the Trusts of the several Turnpike Roads in the Neighbourhood of the Metropolis North of the River Thames are hereby repealed; and in lieu thereof be it enacted, that no building, structure, or erection shall, without the consent in writing of the Metropolitan Board of Works, be erected beyond the general line of buildings in any street, place, or row of houses in which the same is situate in case the distance of such line of buildings from the highway does not exceed fifty feet, or within fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet, notwithstanding there being gardens or vacant spaces between the line of buildings and the highway, such general line of buildings to be decided by the superintending architect to the Metropolitan Board of Works for the time being; and in case any building, structure, or erection be erected, or be begun to be erected or raised, without such consent or contrary to the terms and conditions on which the same may have been granted, it shall be lawful for the vestry of the parish or the board of works for the district in which such building or erection is situate to cause to be made complaint thereof before a justice of the peace, who shall thereupon issue a summons requiring the owner or occupier of the premises, or the builder or person engaged in any work contrary to this enactment, to appear at a time and place to be stated in the summons to answer such complaint; and if at the time and place appointed in such summons the said complaint shall be proved to the satisfaction of the justice before whom the same shall be heard, such justice shall make an order in writing on such owner or occupier, builder, or person, directing the demolition of any such building or erection, or so much thereof as may be beyond the said general line so fixed as aforesaid, within such time as such justice shall consider reasonable, and shall also make an order for the payment of the costs incurred up to the time of hearing; and in default of the

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building or erection complained of being demolished within the time limited by the said order, the said vestry or board shall forthwith enter the premises to which the order relates and demolish the building or erection complained of, and do whatever may be necessary to execute the said order, and may also remove the materials to a convenient place, and subsequently sell the same, as they think fit . . . ."

The London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 22: "(1.) No building or structure shall without the consent in writing of the council be erected beyond the general line of buildings in any street or part of a street place or row of houses in which the same is situate in case the distance of such line of buildings from the highway does not exceed fifty feet or within fifty feet of the highway when the distance of the line of buildings therefrom amounts to or exceeds fifty feet notwithstanding there being gardens or vacant spaces between the line of buildings and the highway. Such general line of buildings shall if required be defined by the superintending architect by a certificate such certificate to be issued within one month from the date of the application therefor.

"(2.) This section shall not apply to any building or structure erected after the commencement of this Act upon land which either at the commencement of this Act or at any time within seven years previously has or shall have been lawfully occupied by a building or structure."

Sect. 25: "The local authority or any person deeming himself aggrieved by the certificate of the superintending architect may appeal to the tribunal of appeal."

Sect. 27: "The consent by the council to the erection of any building or structure beyond the general line of buildings in any part of a street or the erection of such building or structure shall not be deemed to affect or alter in that or any other part of the street the general line of buildings as existing at the time of such consent."

Sect. 216: "All bye-laws regulations orders consents conditions and notices duly made given imposed or issued under any Act hereby repealed shall so far as applicable for the purposes of this Act be of the same validity and effect as if they had been made given imposed or issued under this Act And all such bye-laws and regulations shall remain in force until the same shall be revoked altered or varied by bye-laws duly made under the provisions of this Act."

W. H. G,

[IN THE COURT OF APPEAL.]

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Nov. 4, 5, 6, 30.

WHITE AND HALES, APPELLANTS; THE MAYOR, ALDERMEN, AND COUNCILLORS OF THE METROPOLITAN BOROUGH OF ISLINGTON, RESPONDENTS.

Rates—Rateability of Owner—Parliamentary Borough—Tenement wholly let out in Apartments or Lodgings—Representation of the People Act, 1867 (30 & 31 *Vict. c.* 102), *s.* 7—*Poor Rate Assessment and Collection Act*, 1869 (32 & 33 *Vict. c.* 41), *ss.* 3, 4.

The appellants were the owners of tenements situate in a borough which in the year 1867 was, and ever since had been, a parliamentary borough. The tenements were wholly let out in apartments or lodgings not separately rated within the meaning of s. 7 of the Representation of the People Act, 1867. Purporting to act under that section, the rating authority rated the appellants as owners, instead of the occupiers of the tenements, without allowing them any commission, abatement, or reduction:—

Held, that the appellants were properly rated as owners (instead of the occupiers) under s. 7 of the Representation of the People Act, 1867, and were therefore not entitled to any commission, abatement, or reduction from the amount of the rate.

Davis v. *Wallis*, [1908] 2 K. B. 134, overruled.

That portion of s. 7 of the Representation of the People Act, 1867, which provides for the rating of owners of houses wholly let out in apartments or lodgings not separately rated has not been repealed by implication by the Poor Rate Assessment and Collection Act, 1869, or otherwise.

APPEAL from the decision of a Divisional Court (Lawrance, Jelf, and Sutton JJ.) upon a special case stated on appeal against a rate by order of a judge in chambers upon an application under s. 11 of the Quarter Sessions Act, 1849. The case was substantially in the following terms:—

2. On March 28, 1908, a general rate was made by the respondents (1) for the metropolitan borough of Islington, and allowed by two justices, for defraying the expenses of the borough council and for the relief of the poor and for other purposes chargeable thereon according to law after the rate of 3*s.* 9*d.* in

(1) Throughout this report the terms "appellants" and "respondents" are used with reference to the positions of the parties on the appeal against the rate, and not to their positions in the Court of Appeal.

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the pound apportioned at the rates in the pound thereafter shewn for the several purposes therein mentioned. The rate was apportioned amongst the following purposes:—(1.) The relief of the poor and other expenses of the board of guardians, (2.) contributions to the London County Council, (3.) contributions to the receiver for the metropolitan police district, and (4.) the expenses of the borough council; and the rate was made payable in two equal instalments on April 1 and July 1, 1908.

3. In and by such rate the appellant Sidney White was rated as the owner, pursuant as therein stated to s. 7 of the Representation of the People Act, 1867, in respect of a house, No. 229, Essex Road, at a gross estimated rental of 65*l.* and a rateable value of 55*l.* The amount assessed upon and made payable by him at 3*s.* 9*d.* in the pound was 10*l.* 6*s.* 3*d.*, and the first instalment was stated to be 5*l.* 3*s.* 1½*d.*, as set out in the schedule to the case.

4. The appellant Alexander Hales was in and by such rate rated, pursuant to the said section, as owner of Nos. 38, 42, 48, and 52, Dorset Street, within the said borough, of the gross estimated rentals and rateable values, and with the other particulars, specified in the schedule.

The following is a portion of the extract from the rate book in the schedule to the case:—

Number of House.	Gross.	Rateable.	Amount assessed.
229, Essex Road	£65	£55	£10 6 3
38, Dorset Street	20	16	3 0 0
42, ,, ,,	20	16	3 0 0
48, ,, ,,	22	18	3 7 6
52, ,, ,,	21	17	3 3 9

5. As provided by the London Government Act, 1899, the general rate of the metropolitan borough of Islington (which rate was established by the Metropolis Local Management Act, 1855) and the poor rate of the said borough are assessed, made, and levied together by the mayor, aldermen, and councillors of the said borough (hereinafter called the council) as one rate, which pursuant to the said London Government Act, 1899, is

termed the "general rate," and, as provided by the said Act, it is assessed, made, collected, and levied as if it were the poor rate; and by the said Act it is also provided that all enactments applying or referring to the poor rate (subject to the provisions of the Act as to audit) are to be construed as applying or referring also to the general rate thereby established.

6. The appellants were so rated by the council in respect of the said houses in pursuance, as the council considered, of s. 7 of the Representation of the People Act, 1867, which enacts as follows (1):—

The term "borough" is by s. 61 of the said Act defined as

(1) Representation of the People Act, 1867, s. 7: "Where the owner is rated at the time of the passing of this Act to the poor rate in respect of a dwelling-house or other tenement situate in a parish wholly or partly in a borough, instead of the occupier, his liability to be rated in any future poor rate shall cease, and the following enactments shall take effect with respect to rating in all boroughs:—

"(1.) After the passing of this Act no owner of any dwelling-house or other tenement situate in a parish either wholly or partly within a borough shall be rated to the poor rate instead of the occupier, except as hereinafter mentioned:

"(2.) The full rateable value of every dwelling-house or other separate tenement, and the full rate in the pound payable by the occupier, and the name of the occupier, shall be entered in the rate book:

"Where the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor rate:

"Provided . . . ."

Poor Rate Assessment and Collection Act, 1869, s. 3: "In case the rateable value of any hereditament does not exceed twenty pounds, if the hereditament is situate in the metropolis, ... and the owner of such hereditament is willing to enter into an agreement in writing with the overseers to become liable to them for the poor rates assessed in respect of such hereditament, for any term not being less than one year from the date of such agreement, and to pay the poor rates whether the hereditament is occupied or not, the overseers may, subject nevertheless to the control of the vestry, agree with the owner to receive the rates from him, and to allow him a commission not exceeding twenty-five per cent. on the amount thereof."

Sect. 4: "The vestry of any parish may from time to time order that the owners of all rateable hereditaments to which section 3 of this Act extends, situate within such parish, shall be rated to the poor rate in respect of such rateable hereditaments, instead of the occupiers, on all rates made after the date of such order; and

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a borough returning a member or members to serve in Parliament. The borough of Islington (then the parish of Islington) was at the date of the passing of that Act and for many years previously, and ever since has been, wholly situate in a borough returning a member or members to serve in Parliament.

7. All the above-mentioned houses were at the date of the rate, and still are, wholly let out in apartments or lodgings, which apartments or lodgings are not, and were not at or before the making of the said rate, separately rated. Neither appellant has at any time been or is now the occupier of the said house or houses or any part thereof in respect of which he was so rated, but the appellant Sidney White is and has for some years been the owner of 229, Essex Road, and the appellant Alexander Hales is and has for some years been the owner of the said houses in Dorset Street.

8. There are four tenants in the house 229, Essex Road, and two tenants in each of the houses in Dorset Street. Each tenant has a separate letting and a separate key, and each tenant has the exclusive use and occupation of the room or rooms let to him or her. The only parts of each house which are used in common by the tenants thereof are the outer doors, passages and stairs and water closets, and a room in the basement used as a scullery or washhouse with a copper. Each of the tenants in each house uses in common the said parts thereof. None of the apartments or lodgings in any of the said houses are structurally separated from each other as in the case of flats. There is only

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thereupon and so long as such order shall be in force the following enactments shall have effect:—

"(1.) The overseers shall rate the owners instead of the occupiers, and shall allow to them an abatement or deduction of fifteen per centum from the amount of the rate:

"(2.) If the owner of one or more such rateable hereditaments shall give notice to the overseers in writing that he is willing to be rated for any term not being less than one year in respect of all such rateable hereditaments of which he is the owner, whether the same be occupied or not, the overseers shall rate such owner accordingly, and allow to him a further abatement or deduction not exceeding fifteen per centum from the amount of the rate during the time he is so rated."

one door in each house in the nature of a front door, and the rooms on the several floors are entered by ordinary doors as in a house occupied by one family only. The appellants respectively exercise no supervision or control over the said houses.

9. The house No. 229, Essex Road is upwards of fifty years old and was built for the occupation of one family. At the date of the passing of the Representation of the People Act, 1867 (August 15, 1867), the said house was in the occupation of one person only, who was rated in respect of it as occupier, but in or about the year 1892 it was wholly let out in apartments or lodgings to two or more persons, and has been ever since that date and still is so let, and since that year the owner of the said house has been rated by the council or its predecessors, the overseers of the poor of the parish of Islington and the vestry of the parish, at the full rate in the pound on the full rateable value of the said house, and such rate has been paid accordingly up to Lady Day, 1908. The separate apartments or lodgings in the said house have never been separately rated.

10. The owners of the said houses in Dorset Street were rated in respect thereof on August 15, 1867, one of such houses being wholly let out in apartments or lodgings not separately rated, and a reasonable reduction, abatement, or allowance was made. From thence until Lady Day, 1901, such owners were allowed an abatement or allowance under s. 3 of the Poor Rate Assessment and Collection Act, 1869, when the rateable value of each house did not exceed 20*l*., and when such house was not wholly let out in apartments or lodgings, and such apartments or lodgings were never separately rated. From Lady Day, 1901, the owners have been rated at the full rateable value, no abatement or allowance having been made.

11. In the rate appealed against no abatement or allowance from the full amount of the said rate was made in favour of the appellants as owners, as provided by the Poor Rate Assessment and Collection Act, 1869, or otherwise.

12. On April 6, 1908, the appellants gave notice of appeal against the said rate to the next general quarter sessions of the peace holden in and for the county of London, and duly served the same on the respondents.

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13. On April 28, 1908, Bray J., in chambers, made an order for the statement of the present case.

The questions for the opinion of the Court are:

1. Whether the appellant Sidney White was properly rated in the said rate in the second paragraph mentioned as owner of the said house 229, Essex Road, pursuant to s. 7 of the Representation of the People Act, 1867, or otherwise.

2. Whether the appellant Alexander Hales was properly rated in the said rate as owner of the said houses in Dorset Street, pursuant to the said section or otherwise.

3. Whether so much of the said s. 7 as provided for the rating of owners of houses wholly let out in apartments or lodgings not separately rated has been repealed by implication by the Poor Rate Assessment and Collection Act, 1869, or otherwise.

4. If an owner of a dwelling-house or tenement can now be rated under s. 7 of the Representation of the People Act, 1867, is it necessary that the respondents should prove that each of the said houses the subject of this appeal was wholly let out in apartments or lodgings not separately rated on August 15, 1867, before the said section can apply to such house?

5. Whether under whatever Act the respondents purported to rate the appellants, or either of them, some and what abatement or allowance should have been made in the rate to the appellants or either of them as owners or owner.

6. Whether in any case the said rate should not be amended, inasmuch as no allowance, abatement, or deduction had ever been made or allowed to the appellants, but, on the contrary, had been refused to them.

7. Whether the said rate should be quashed or amended, and if quashed to what extent, and if amended how it should be so amended.

On the hearing of the case in the Divisional Court counsel for the respondents (the Islington Borough Council) admitted that it could not be distinguished from *Davis* v. *Wallis* (1), and submitted to judgment for the appellants with a view to an appeal. The Divisional Court thereupon allowed the appeal, their order

(1) [1908] 2 K. B. 134.

stating that the Court answered the first and second questions submitted for their opinion in the negative, and adjudged that judgment be entered at quarter sessions in conformity with such answers. The respondents appealed.

Montague Lush, K.C., and *Ryde* (*J. W. McCarthy* with them), for the Islington Borough Council. The decision in *Davis* v. *Wallis* (1) was wrong and should be overruled. The effect of s. 7 of the Representation of the People Act, 1867, was by implication to repeal any previously existing enactments under which the owner was liable to be rated in respect of a dwelling-house as regards parishes situate wholly or partly in a parliamentary borough, for it provided that thenceforward no owner of any dwelling-house or other tenement situate in such a borough should be rated to the poor rate except as thereinafter mentioned, and it went on to provide that, where the dwelling-house or tenement should be wholly let out in apartments or lodgings not separately rated, the owner should be rated. The effect of the section was not, as suggested by the appellants, merely to reserve the existing power of rating the owner as regards such dwelling-houses or tenements, but to enact substantively that in the case of such dwelling-houses or tenements the owner should be rated. The Acts under which owners were previously rated were permissive only, and consequently there were in 1867 many boroughs in which no Act for rating owners was in operation. In a few boroughs Sturges Bourne's Act (59 Geo. 3, c. 12) was in operation, and in others the Small Tenements Act, 1850 (13 & 14 Vict. c. 99), or local Acts under which owners were liable to be rated. Sect. 7 of the Act of 1867 is imperative and provided that thenceforward the provisions contained in it should take effect with regard to "all" boroughs.

The appellants contend, as was contended in *Davis* v. *Wallis* (1), that the Representation of the People Act, 1867, was a franchise Act and not a rating Act. If the language of s. 7 had been ambiguous, there might have been force in the suggestion that the section cannot be regarded as a substantive provision with regard to rating owners; but the

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language is perfectly clear, and enacts that for the future owners shall not in general be rated, but in certain cases they shall be rated, in all boroughs. The operation of the section is not confined to cases where the franchise is in question; the language is quite general. The occupier of the dwelling-house or tenement might be an alien, or a woman, and therefore not qualified for the franchise, but the provisions of the section as to whether the owner should or should not be rated would nevertheless take effect. The word "owner" in the earlier part of sub-s. 1 of s. 7 must clearly be read as referring to owners who are not occupiers, for an owner who occupies is rated as occupier and not as owner. The concluding clause of s. 7 is an exception out of that class, namely, of owners (who are not occupiers) of dwelling-houses or tenements "wholly let out in apartments or lodgings not separately rated." The words "not separately rated" cannot be read as meaning "not separately rateable." They were probably inserted with a view to saving the right to the franchise of the occupiers of such apartments or separate parts of houses as were separately rated at the date of the Act. The object of the clause may have been either to prevent too wide an extension of the inhabitant occupier franchise, or to prevent the Act from casting upon overseers the difficult and almost impossible task of inquiring into the occupation of and making a separate valuation of the different rooms in a house.

The appellants contend that the provisions of s. 7 with regard to the rating of owners are no longer in force, and that the provisions of the Poor Rate Assessment and Collection Act, 1869, are the only provisions under which owners can now be rated. But that Act neither expressly nor by necessary implication repeals s. 7 of the Act of 1867. The provisions of s. 14 of the Parliamentary and Municipal Registration Act, 1878, which enacts that s. 19 of the Act of 1869 shall not be deemed to apply exclusively to cases within s. 3 and s. 4 of that Act, but shall be of general application, are strong to shew that s. 7 of the Act of 1867 remains in force; and the Representation of the People Act, 1884, by which the inhabitant occupier qualification was extended to the counties in Great Britain and to both counties and boroughs in Ireland, appears to recognize by implication the

existence of the provisions of s. 7 of the Act of 1867 with regard to the rating of owners. Sect. 7 of the Act of 1869 provided that payment of the rate by the owner under that Act should be deemed a constructive payment of the full rate by the occupier for the purpose of the franchise; s. 9 of that Act imposed upon the owner of dwelling-houses who agrees to pay the rate or is rated under that Act the duty of sending a list of the occupiers to the overseers; and s. 19 rendered it the duty of the overseers, whether the rate is collected from the owner or the occupier, or whether the owner is liable to the payment of the rate instead of the occupier, to enter the name of the occupier in the occupiers' column of the rate book. Those enactments are rendered applicable to Ireland by s. 9, sub-s. 7, of the Representation of the People Act, 1884; and, therefore, unless the provisions of s. 7 of the Act of 1867 with regard to the rating of owners are still in force, the provisions of sub-ss. 2 and 3 of s. 9 of the Act of 1884, which contain provisions similar to the above-mentioned enactments of the Act of 1869, and which are stated to be applicable to every part of the United Kingdom, are unnecessary and inoperative.

Alexander Glen, *K.C.*, and *Kyffin*, for the appellants. The clause of s. 7 of the Act of 1867 which deals with the rating of owners where houses are wholly let out in apartments or lodgings not separately rated is not a substantive enactment, but merely a saving clause which leaves those persons who come within it subject to the law of rating as it previously existed. On the face of the clause itself there are various reasons why it cannot be regarded as a substantive provision for imposing rates on owners de novo. It contains no definition of the term "owner"; there is no provision for the making or recovery of a rate to be so imposed, or for an appeal against such a rate; nor is there any compensation given to owners for shifting the burden from the occupiers on to their shoulders, a burden which in the aggregate is very great. Every other enactment dealing with the rating of owners has provided for a composition in respect of rates, that is to say, some allowance to the owner by way of compensation. The word "borough," for the purpose of the Act of 1867, is defined by s. 61 of that Act to mean a parliamentary borough;

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there is no reason why a class of owners in boroughs which happen to be parliamentary boroughs should have the burden of rates cast upon them without any compensation, while in boroughs not parliamentary they obtain such compensation. The words "in all boroughs," &c., in s. 7 only mean that the general law that the occupiers shall be rated shall apply thenceforward to parliamentary boroughs where owners had previously been rated as well as to those where they had not been, subject to the exception in the saving clause. In all the decided cases it has apparently been assumed that the clause in question was an exception clause and was confined to cases in which the owners could be rated before the passing of the Act of 1867: *Stamper* v. *Overseers of Sunderland* (1); *Boon* v. *Howard*. (2) The result of the clause was that the occupiers were excluded from the franchise in cases where it applied. The Legislature, by the Poor Law Assessment and Collection Act, 1869, amended the law in that respect, and gave the franchise to occupiers in cases where the rate was collected from the owner or where the owner was rated: see s. 19. That Act by s. 6 repealed the Small Tenements Act, 1850, and all local enactments providing for the rating of owners, including the Islington Act, so that there was then nothing left upon which the saving clause in s. 7 of the Act of 1867 could operate. It further introduced by ss. 3 and 4 a new set of statutory provisions under which alone thenceforward owners could be rated. The previous law with regard to the rating of owners being then abolished, any portion of it which was saved by the clause in question from the effect of the enacting part of the section was abolished also.

In *Cross* v. *Alsop* (3) there was an agreement between the owner and the overseers which provided for the collection of the rate from the owner, but which was not of the character contemplated by the Poor Rate Assessment and Collection Act, 1869, and the Court expressed the opinion that s. 19 of that Act only applied where the case came within s. 3 or s. 4 of the Act.

(1) (1868) L. R. 3 C. P. 388, at pp. 397, 398, 401.

(2) (1874) L. R. 9 C. P. 277, at pp. 301, 309.

(3) (1870) L. R. 6 C. P. 315.

It cannot in any way be inferred from that decision that there was any power to rate owners under s. 7 of the Act of 1867 which remained in existence after the Act of 1869 came into force. *In Smith* v. *Overseers of Seghill* (1) the Court took a different view from that expressed as before mentioned in *Cross* v. *Alsop* (2), and held that s. 19 of the Poor Rate Assessment and Collection Act, 1869, was not confined to the cases mentioned in s. 3 and s. 4, but was of general application. There being thus a doubt as to the meaning of s. 19, the Legislature intervened by s. 14 of the Parliamentary and Municipal Registration Act, 1878, for the purpose of settling the matter. It cannot, however, be supposed that by that section the Legislature recognized that there was still power to rate owners otherwise than under the Act of 1869. The provisions of s. 9, sub-ss. 2 and 3, of the Representation of the People Act, 1884, were necessary in all parts of the United Kingdom because of the introduction of the service franchise. [They also cited *Churchwardens of West Ham* v. *Fourth City Mutual Building Society* (3); *Davis* v. *Wallis*. (4)]

Montague Lush, K.C., in reply. The contention for the appellants really involves the proposition that s. 7 of the Act of 1867 has been repealed altogether. No doubt in the case of a saving clause properly so called, when the legislation from which it is an exception is gone, that exception falls to the ground also. But it is a fallacy to suggest that the provision in question is merely a saving clause. Before the Act of 1867 any legislation with regard to rating owners was permissive only; it gave an option to the parochial authorities to rate, or collect the rate from, owners, but did not compel them to do so. Under the Act of 1867 the legislation on the subject was imperative, and the overseers were obliged in cases within the clause in question to rate the owners and not the occupiers. The effect of the appellants' contention is that it would be optional with the overseers whether they would or would not disfranchise a large number of occupiers of tenements by rating the owners. The expressions used by the judges with regard to s. 7 of the Act of 1867 in

(1) (1875) L. R. 10 Q. B. 422.
(2) L. R. 6 C. P. 315.
(3) [1892] 1 Q. B. 654.
(4) [1908] 2 K. B. 134, 139.

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cases like *Bradley* v. *Baylis* (1) are quite incompatible with that contention.

Cur. adv. vult.

Nov. 30. VAUGHAN WILLIAMS L.J. read the following judgment:—This is an appeal from the decision of a Divisional Court of the King's Bench Division, which has followed the previous decision of the King's Bench Division in *Davis* v. *Wallis* (2) on a special case stated by a justice of the peace of the county of London. The Divisional Court held in that case that the Act under which the then respondent was rateable as owner instead of the occupier was not the Representation of the People Act, 1867, but was the Poor Rate Assessment and Collection Act, 1869, and that he was entitled to the commission, abatement, or deduction specified in s. 3 or s. 4 of the Act of 1869. [The Lord Justice read extracts from the facts set out in the case of *Davis* v. *Wallis* (2), together with the contentions of the parties as they appear in the report of that case, and then proceeded:—]

The facts and questions of law arising in the present case are to be taken to be the case of *Davis* v. *Wallis* (2), in which case the Divisional Court held that the appeal must be dismissed, Lord Alverstone C.J. basing his decision on the proposition that the position of owners who are to be rated instead of occupiers is now governed by the Poor Rate Assessment and Collection Act, 1869, and not by the Representation of the People Act, 1867, and that the claim of the borough council to rate the then respondent under s. 7 of the Act of 1867 could not be supported. A. T. Lawrence J. was of the same opinion, saying that the mistake on which the argument of the borough council was based consisted in reading s. 7 of the Representation of the People Act, 1867, as a substantive rating enactment. He says, "I regard it as merely machinery for the purposes of the franchise, and as having no intention to alter the amount, incidence, or collection of the rates." Both Lord Alverstone C.J. and A. T. Lawrence J. said that they were not prepared to hold that s. 7 of the Act of 1867 was repealed.

The principal argument urged before us on behalf of the

(1) (1881) 8 Q. B. D. 195. (2) [1908] 2 K. B. 134, 139.

appellants was not so much that s. 7 of the Representation of the People Act, 1867 (so far as it prohibits the rating of owners), must be regarded as impliedly repealed by the Poor Rate Assessment and Collection Act, 1869, as that, inasmuch as a new scheme of assessing owners has been provided by the Act of 1869 allowing a special deduction of 15 per cent. off the rateable value to the owner, and inasmuch as at the present time the provisions of Sturges Bourne's Act by implication have been repealed, and the Small Tenements Act, 1850, has been expressly repealed, it follows that the Act of 1869 is the only Act which can be applied to for the purpose of rating the owner instead of the occupier, and that this is inconsistent with the continuance in force of that part of s. 7 which enacts that "where the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor rate." It is said that this provision cannot stand together with the provisions of ss. 3 and 4 of the general rating Act, the Poor Rate Assessment and Collection Act, 1869, which provide that the owner may be rated either by agreement with the overseers or by the order of the vestry, and which in either case provide for a deduction or abatement from the amount of the rate so to be paid by the owner instead of the occupier. This part of the argument was largely based on the case of *Churchwardens of West Ham* v. *Fourth City Mutual Building Society* (1), in which A. L. Smith J., in delivering the judgment of himself and Mathew J., said: "If it is now sought to rate the owner instead of the occupier, the Act of 1869 is the only Act which can be applied to for that purpose." This argument Mr. Lush answered by pointing out that that case was not, as this is, a case dealing with the rating of a tenement which in 1867 was situate within a parliamentary borough, and that therefore it did not conclude the present case. But notwithstanding the fact that Lord Alverstone C.J. agreed that the West Ham case did not conclude the present case, he held that the position of owners who are to be rated instead of occupiers of hereditaments is now governed by the Poor Rate Assessment and Collection Act, 1869, and not by

(1) [1892] 1 Q. B. 654, at pp. 660, 661.

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the Representation of the People Act, 1867, on the ground, as I understand, that where the franchise Act of 1867 and the general rating Act of 1869 conflict, the provisions of the general rating Act, as to rating the owner instead of the occupier, must prevail over this clause in the franchise Act, which is in substance an exception, as A. L. Smith J. points out in the West Ham case, from the enactment in s. 7 of the Act of 1867 that in a parliamentary borough no owner shall be rated instead of the occupier.

It is convenient here to make some observations upon the construction of s. 7 of the Act of 1867. I have seen the judgment of Buckley L.J., and his reasoning has convinced me that the owners who fall within sub-s. 1, or within the words which follow sub-s. 2, are not limited to owners who under the legislation existing at the time of the passing of the Act of 1867 could have been rated under the conditions of such legislation, public or private. I think that, for reasons which I shall presently set forth, the object of the exception in s. 7 was such as to make it reasonable and natural that the Legislature should except from the operation of the prohibition a substantive provision which is in no way connected with the provisions of the antecedent legislation for rating owners instead of occupiers, which provisions, by the prohibitions in s. 7, are to be of no further effect.

I am inclined to think that the exception which we have to consider is intended not to deal with any liability of owners to be rated instead of occupiers which existed by virtue of either Sturges Bourne's Act, or the Act of 1850, or some local Act, but with the difficulty which arose from the wording of the Act of 1867 itself. Sect. 61 of that Act defines dwelling-house as including any part of a house occupied as a separate dwelling and separately rated to the relief of the poor. Sect. 3 gives a right to be registered as a voter to vote for members to serve in Parliament for a borough to every man who is qualified as follows: (1.) Is of full age; (2.) is on the last day of July in any year, and has been during the preceding twelve months, an inhabitant occupier as owner or tenant of any dwelling-house within the borough; (3.) has during the time of such occupation been rated as an ordinary occupier; (4.) has paid the poor rates.

Sect. 4 deals with the lodger franchise and, instead of requiring the qualification of being rated and paying the rates, substitutes a year's occupation as sole tenant of the same lodgings of the clear yearly value of 10*l.* if let unfurnished.

It was these provisions, in my opinion, which made it necessary to provide for the exception from the prohibition against rating owners instead of occupiers, which is to apply in the case of a dwelling-house or tenement wholly let out in apartments or lodgings not separately rated. The necessity for such a provision seems to me to arise in this way. Suppose that at the date of the passing of the Act of 1867 there was a dwelling-house wholly let out in apartments or lodgings in respect of which a non-resident owner was rated to the poor, the effect of s. 61 would be that the occupier of a part of such dwelling-house as a separate dwelling would have been able, if he could get himself separately rated as an occupier, to claim the franchise under s. 3, although his position up to the time of the passing of the Act was that only of a mere lodger who under s. 4 can only claim the franchise if such lodgings are of a clear yearly value, if let unfurnished, of 10*l.* a year or upwards. I think that this provision in s. 7 of the Act of 1867 which we are dealing with means that, if the relation at the time of the passing of the Act of 1867 subsisting between the owner of a dwelling-house or tenement and the lessee of apartments or lodgings was such that the apartments or lodgings were not separately rated, the owner and not the occupiers of the part of a house constituted a dwelling-house by the definition in s. 61 should be rated to the poor.

I should certainly be disposed, if I could consistently with the true construction of the Acts respectively of 1867 and 1869, to uphold the decision of the King's Bench Division, for it seems prima facie improbable that the Legislature should have passed a general rating Act in 1869 enabling the rating authorities to rate, in the case of hereditaments not exceeding certain rateable values, owners instead of occupiers, granting the owner rated instead of the occupier in every such case an abatement or deduction from the full rate, and yet intentionally omit such abatement or deduction in the case of the owner of "a dwelling-house wholly let out in apartments or lodgings not separately

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rated," such owners having first become rateable under s. 7 of the Representation of the People Act, 1867, by way of exception to a general provision that the liability antecedent to the Act of 1867 of owners to be rated instead of occupiers shall cease, and that no owner of any dwelling-house or other tenement situate in a parish either wholly or partly within a borough (i.e., a parliamentary borough) shall be rated to the poor rate instead of the occupier.

It is difficult to conceive why the abatement or deduction should generally be allowed under the Act of 1869, and not extended to owners of dwelling-houses or tenements wholly let out in apartments or lodgings not separately rated, who are rated instead of the occupier; but I cannot put upon the words of ss. 3 and 4 of the Act of 1869 any construction which enables me to apply the provisions as to abatement and deduction to owners rated instead of occupiers under the provisions of s. 7 of the Act of 1867. Indeed I do not think that the Act of 1869 affects the Act of 1867 in any respect. It seems to me that the Act of 1869 was only intended to put those owners on the rate book who were not already there; owners in parliamentary boroughs of dwelling-houses or tenements wholly let out in apartments or lodgings not separately rated were rightfully placed already on the rate book under s. 7 of the Act of 1867, and were subject to the full rate, since there are no words in the section justifying any abatement or deduction whatsoever. I could better understand a contention that the effect of the Act of 1869 was to repeal the prohibition in s. 7 of the Act of 1867, and that, the prohibition in that section against rating owners having gone, the substantive exception to the prohibition by the rating of owners instead of occupiers in the case of houses or tenements wholly let out in apartments or lodgings not separately rated went also; but it is to be remembered that the rating of owners of dwelling-houses or tenements wholly let out in apartments or lodgings is an exception from the prohibition, and not an exception from any liability of owners instead of occupiers authorized by the Acts the operation of which is by s. 7 prohibited in parliamentary boroughs. Those Acts contain no provisions as to dwelling-houses or tenements wholly let out

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in apartments or lodgings. Moreover, the result of this repeal would be not that the owners of such dwelling-houses or tenements would be entitled to the abatement or deduction under the Act of 1869, but that the owners of such dwelling-houses or tenements would not be rateable at all.

The judges of the King's Bench Division have rejected the idea of the Act of 1869 having repealed s. 7 of the Act of 1867, and have merely treated the Act of 1869 as having introduced into s. 7 of the Act of 1867 the provision giving to the owner of a house or tenement wholly let out in apartments or lodgings not separately rated the right of deduction or abatement accorded to an owner rated instead of the occupier under the Act of 1869. To some extent I agree with the Lord Chief Justice and A. T. Lawrence J., for I cannot persuade myself that the Act of 1869 repeals s. 7 of the Act of 1867, and am, as I have already said, partly led to that conclusion because to hold that section repealed would relieve the owner of the dwelling-house wholly let out in apartments or lodgings altogether from liability to be rated instead of the occupier, which I cannot think the Legislature intended. In short, I do not think that the Act of 1869 either repeals or in any way affects s. 7 of the Act of 1867. The result is, I think, that this appeal must be allowed.

BUCKLEY L.J. read the following judgment:—This appeal, in my judgment, succeeds. The question for decision is as to the true construction of s. 7 of the Representation of the People Act, 1867. That was an Act whose primary object was to make alterations in the franchise. The Act by s. 3 created a franchise dependent upon qualification by (first) occupation and (secondly) payment of rates in respect of the premises occupied. The Act also effected alterations in rating. These are no doubt to be read as introduced for the purpose of giving fuller effect to the franchise created. A purpose, and perhaps the main purpose, of s. 7 was under the circumstances to make the occupier, and not the owner, rateable in the cases to which the section applied, with a view to enlarging the area of the new franchise by clothing occupiers who were not theretofore rateable with the qualification of rateability. But it is erroneous, I think, to describe the Act

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as a franchise Act and not a rating Act. It is a franchise Act and consequentially a rating Act. It is a franchise Act for whose larger effect alteration was made in the law of rating, and thus was also a rating Act.

When the Act of 1867 was passed there were in operation—(1.) Sturges Bourne's Act of 1819 (59 Geo. 3, c. 12), which by s. 19 empowered the vestry to resolve that owners of houses let at a rent not exceeding 20*l.* nor less than 6*l.* a year should be assessed to the rates instead of the occupiers. That Act extended throughout England. (2.) The Small Tenements Act, 1850 (13 & 14 Vict. c. 99), which with a view to the better collection of rates enacted that the vestry might order that owners of tenements whose yearly rateable value did not exceed 6*l.* should be rated in respect of such tenements instead of the occupiers. That Act extended to England and Wales, and did not apply to any place where owners were liable to be rated under the provisions of a local Act. These two Acts were concurrent. They had application under different circumstances, except that, inasmuch as the former was applicable when the rent was not less than 6*l.* a year, and the latter when the rateable value (not the rent) did not exceed 6*l.*, the two Acts might in some cases overlap. And there were (3.) a number of private Acts, said to exceed 100 in number, under which the vestry or some local authority could resolve that the owner should be rated instead of the occupier in defined cases. The operation of these local Acts was, it is believed, in all cases limited to tenements of small value, but value was not the only test of their permissive applicability. For instance, the Islington Act, the one in question in this case, enables the vestry to throw the rates upon the landlord when the yearly rent or value does not exceed 20*l.*, or when the house is let for less than a year, or is let furnished, or is let in separate apartments, whether furnished or unfurnished. There were thus under these local Acts a number of cases (dependent either upon small value of an amount varying, I believe, in different places, or dependent, irrespective of value, on circumstances relating to the particular tenement) in which the vestry could make the owner, and not the occupier, the person rateable. This system of legislation by virtue either of local Acts or of the general Acts prevailed

throughout England, but it was everywhere permissive and not obligatory.

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In this state of things s. 7 of the Act of 1867 was passed. The initial words of the section, "Where the owner is rated at the time of the passing of this Act," do not mean where the fact is that a particular person is at that time rated as owner. Fairly read, they mean where, having regard to the then existing legislation, the class who are rated in respect of certain tenements are not the occupiers, but the owners. The effect of the opening clause, I think, is that the then existent statutory liability of the owner of a small tenement, or of any other tenement to which that legislation extended, to be rated instead of the occupier shall as from 1867 cease as regards any future rate. The subsequent words—"the following enactments shall take effect with respect to rating in all boroughs"—mean, I think, that the Legislature, taking note that there were in England at that time boroughs in which certain owners were and boroughs in which no owners were (except potentially in the event of the local authority availing itself of the permissive general enactments) rated, proceeded to provide that in all boroughs, that is to say, in every borough throughout England, whether at that time, namely, 1867, by local Act or by exercise of the permissive power in the general Act, the owner was rateable instead of the occupier or not (including therefore boroughs in which the right to rate the owner existed in the potential and not the actual sense), the provisions of s. 7 should apply. Sub-clause 1 and the words which follow sub-clause 2 then, in my opinion, have this effect, that no owner of a dwelling-house in any borough in England shall be rated instead of the occupier except where the tenement shall be wholly let out in apartments and such apartments are not separately rated.

A point deserving close consideration is whether the words "no owner" are to be understood to mean "no owner who if this Act had not been passed could have been rated instead of the occupier," a phrase which I will in that which follows condense into the phrase "no such owner." If that be their meaning, then the owners who fall within sub-s. 1 or within the words which follow sub-s. 2 are only owners who under the then

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existing legislation could have been rated by reason that the tenements were small, or that for some other reason contained in the local Act the power of the vestry extended to them. I think this is not the meaning of the words. The owners who, if the Act of 1867 had not been passed, could have been rated instead of the occupiers could only be ascertained by an examination in each case of the provisions of local Acts, or of the limits of value which satisfied the general Act, and by an inquiry whether the vestry had availed itself of the general Act. If this Act of 1867 had intended so to confine the words, I think it would have used apt language for the purpose. The difficulty in arriving at the conclusion that "no owner" means no owner in its widest sense is that so to read the words is to make the section enact that an owner who could not before the Act of 1867 have been rated should not be rated, which, of course, is prima facie an improbable construction. But I think that the object of the section was to enact a general code or law applicable to all owners in all parts. The words "the following enactments shall take effect . . . . in all boroughs," that "no owner . . . . shall be rated . . . . instead of the occupier," mean, I think, exactly what they say. "No owner" in sub-s. 1 is not, I think, equivalent to "no such owner."

If this construction be correct, then in the exception, which is an exception from the general enactment, the word "owner" must bear the same meaning as in the general enactment. It results that the owner referred to in the exception will include every owner of such a dwelling-house as is spoken of in the section. The contrary view is that after 1867 the intention of the Legislature was that, to determine whether the owner was rateable or not, it should be necessary to inquire whether under the legislation which existed in 1867 the tenement was situate in such a place, and was of such an annual value, or in the other respects mentioned in the local Acts was of such a kind, as that before 1867 the owner could have been rated. I cannot think that this can be sustained. The owner mentioned in s. 7 is, I think, any owner in a parliamentary borough.

The remaining difficulty is as to the words "not separately

rated." There are three, and so far as I can see only three, possible meanings to be attributed to these words. The first meaning is found by reading them as if they were "not separately rateable." If the apartments are not separately rateable the owner and not the occupier must be the person rated. A provision that the owner shall be rated is, in that state of facts, wholly unnecessary. I reject, therefore, this construction as being one which reduces the whole clause of exception to silence. The second is that the words may mean "which shall for the time being not be separately rated." This construction involves that if the rate is laid upon the occupier the owner shall not be rateable, but if it is laid upon the owner he shall; thus assuming and involving an alternative right to rate either the one or the other. That seems to me not only an impossible construction generally, but also, in view of the plain object of this Act, quite inconsistent with its intention. It cannot have been intended that the rating authority should have the power to disfranchise the occupier by exercising an election in favour of rating the owner. The third construction is that the words mean "not separately rated at the date of the passing of this Act." That is an intelligible and probable construction. It has this effect, that where the occupier was rated at the date of the passing of the Act, and therefore had at that date the qualification for the franchise, the Act refused to take it away from him. The provision thus read is one which preserves to ratepayers in esse at the date of the Act the position which they held at that time. This I think is the true construction of the words.

An argument was pressed upon us that these words of exception were intended only to preserve in certain cases the right which theretofore existed to rate the owner. The contention seems to me impossible. The previous legislation resulted in a power extending only to small tenements or tenements of the kind defined in the local Acts, which might or might not be exercised, to rate the owner. This enactment is an affirmative provision that in the cases to which it applies the owner shall be rated, involving that the occupier shall not be rated. *Stamper* v. *Overseers of Sunderland* (1) decided, and I think rightly, that

(1) L. R. 3 C. P. 388.

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where the Act applies the occupier cannot be rated. It is impossible for me to regard an affirmative substantive enactment that the owner shall be rated as preserving a permissive power to render him liable to be rated.

I read s. 7 as a new substantive enactment that no owner of a dwelling-house or tenement in any parliamentary borough shall be rated instead of the occupier, except that where the dwelling-house or tenement is wholly let out in apartments or lodgings, which at the date of the passing of the Act are not separately rated, the owner shall be rated and not the occupier. If this be right, no distinction exists whether the tenement be of small or large annual value or as to any of the circumstances which were the tests of the applicability to the premises of the provisions in the local Acts.

If I am right in what precedes, it is obvious that the Act of 1869 cannot possibly have repealed these provisions of the Act of 1867. The Act of 1869 seems to me to have enacted afresh, with alterations, certain provisions similar in some respects to those which were found in the legislation before 1867. Sects. 3 and 4 of the Act of 1869 enable the owner by agreement to become, or the vestry adversely to the owner to make him, rateable instead of the occupier, allowing a commission or an abatement, justified no doubt by the consideration of easier collection and of the provision that the rate is to be paid whether the premises are occupied or not. This is subject, however, to the provision in s. 7 of that Act that the payment by the owner even of a reduced amount shall be deemed payment of the full rate by the occupier for the purposes of the franchise. Sturges Bourne's Act and the Small Tenements Act had, upon my construction of s. 7 of the Act of 1867, ceased in fact to be operative from the passing of that Act. This Act of 1869, for some reason which I cannot explain, fails to repeal the Act of 1819. It is, I think, of no importance; the Act was in fact inoperative already, and this Court in *Churchwardens of West Ham* v. *Fourth City Mutual Building Society* (1) has already expressed the opinion that as regards rating in a parliamentary borough the Act of 1819 was by the Act of 1867 repealed. The

(1) [1892] 1 Q. B. 654, 659.

Act of 1869 does repeal substantively the Small Tenements Act, 1850.

The points for observation, however, are—(1.) that, if and so far as the Act of 1867 applied not to small tenements, but to tenements in respect of which theretofore the owner could not have been rated, there is no pretence for saying that anything in the Act of 1869 affected the Act of 1867; and (2.) that, while the Act of 1867 had enacted affirmatively that certain owners shall be rated, the Act of 1869 did no more than provide that certain owners may by agreement or by order of the vestry be rendered rateable. The one is imperative, the other permissive. It is scarcely necessary to point out that the words of A. L. Smith J. in the *West Ham Case* (1), that "If it is now sought to rate the owner instead of the occupier, the Act of 1869 is the only Act which can be applied to for that purpose," are confined to the case there before the Court, that is, where the premises are not in a parliamentary borough—that is to say, are premises to which the Act of 1867 does not apply—and have no bearing upon the case of premises in a parliamentary borough to which alone the Act of 1867 applies (see s. 61). The fact is that as regards parliamentary boroughs the Act of 1867 had made certain owners rateable instead of the occupiers, and the Act of 1869 was providing that in certain cases in which the owner was not rateable he might be made rateable. In other words, the cases falling under the Act of 1869 are cases not within the exception to the Act of 1867.

I do not go on to dwell upon the arguments based upon the Acts of 1878 and 1884. They bear out, I think, the view which I have expressed. In the view which I take of the Act of 1867 no distinction is to be drawn between the house or houses in the case before us which did, and the houses which did not, exceed the limit of 20*l*. As regards all of them I think that the operation of s. 7 of the Act of 1867 is, having regard to the facts stated in paragraph 7 of the case, such that the owner and not the occupier is to be rated in respect of them.

The questions in the special case, I think, are to be answered

(1) [1892] 1 Q. B. 654, at p. 660.

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as to Nos. 1 and 2 in the affirmative; as to 3, 4, 5, 6, and 7 in the negative.

KENNEDY L.J. read the following judgment:—In my opinion the decision of this case depends principally upon the interpretation and the applicability of one sentence in s. 7 of the Representation of the People Act, 1867: "Where the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor rate." In construing this enactment we are not without valuable judicial guidance. The view which I take of the meaning of this sentence and of its context in the section of which it forms part is, I think, in accordance with the effect attributed to this piece of legislation in the considered judgments of the Court of Common Pleas (Bovill C.J., Byles and Montague Smith JJ.) in *Stamper* v. *Overseers of Sunderland* (1), given in the year 1868, and with the reasoning, in regard to this enactment, which appears in the considered judgments of the Court of Appeal (Jessel M.R., Baggallay, Brett, Cotton, and Lindley L.JJ.) in *Bradley* v. *Baylis* (2) in the year 1881. The earlier of these two decisions is referred to without any suggestion of disapproval both by Baggallay L.J. and by Brett L.J. in the later case. I must, however, shortly refer to the general scheme of the Act of 1867 in order to make my judgment intelligible.

The Representation of the People Act, 1867, created in parliamentary boroughs two parliamentary franchises—a simple household franchise, irrespective of value, and a lodger franchise. The first was created by s. 3. That section imposed, as Brett L.J. pointed out in *Bradley* v. *Baylis* (3), four conditions: (*a*) A condition as to the house to be occupied; (*b*) a condition as to the mode of occupation; (*c*) a condition as to being rated in respect of that occupation; (*d*) a condition as to payment of the rate. The lodger franchise, conditional upon the occupation for a certain period of the same lodgings in one dwelling-house of the clear yearly value if let unfurnished of at least 10*l*., was

(1) L. R. 3 C. P. 388. (2) 8 Q. B. D. 195.
(3) 8 Q. B. D. at p. 232.

conferred by s. 4 of the Act. The only reason for my referring at all to this fourth section is that it is not unimportant, in construing s. 7, to bear in mind that the occupation of a "lodger" never was and did not under the Act of 1867 mean a rateable occupation, or, as Lindley L.J. (1) put it, "A mere lodger, however, is not, and never was, rateable in respect of his lodgings, the occupation by a lodger of a lodging not being within the Poor Rate Acts."

Now the purpose of the Act of 1867 in s. 3 being to create a household franchise based upon the occupier being rated and paying the rate, its application would in some places have been cramped if the law of rating, as it stood before the passing of the Act, had been left unaltered by the statute. There were then in force two general statutes affecting the rating of owners in certain cases—the Poor Relief Act, 1819 (59 Geo. 3, c. 12), commonly cited as Sturges Bourne's Act, and the Small Tenements Act, 1850 (13 & 14 Vict. c. 99), whereunder, in the case of certain specified tenements of small annual value and let to the occupiers for short terms, a vestry was entitled to order the rating of the owners of such tenements instead of the occupiers. There were also then in force in some boroughs local Acts, not uniform in their provisions inter se, and of even a wider scope than the general Acts, permitting, in the boroughs to which these local Acts respectively related, the rating of owners instead of their occupying tenants in the case of premises let at small rents and in some other specified cases, as, e.g., in the case of houses let furnished, or for a period less than a year, as was provided in the Islington Local Act (20 & 21 Vict. c. cxviii.).

It was apparent that, unless the Legislature interfered, a large number of inhabitant occupiers, in the language of s. 3 of the Act of 1867, who were not, to borrow a phrase of Lindley L.J., mere lodgers, and who would, but for the operation of the Acts of 1819 and 1850, or of one or other of the local Acts, have been rateable under the Statute of Elizabeth in respect of their occupation, would never gain the benefit of the household franchise under s. 3 of the Act of 1867. By s. 7, therefore, the Legislature did interfere, and by the first fourteen lines of that section

(1) 8 Q. B. D. at p. 245.

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(read with the definition section, s. 61) it virtually abrogated, subject only to the operation of the excepting clause which follows, in all parliamentary boroughs the general Acts of 1819 and 1850, and put an end to the operation of any local Act, so far as such local Act provided for the rating of owners instead of occupiers. Subject to the one express exception which follows, the first part of s. 7 imposed a universal law for the future, and provided in regard to all parliamentary boroughs that after the passing of that Act the occupier and not the owner of a dwelling-house or other tenement should be rated to the poor rate, and that the rateable value of every dwelling-house and every separate tenement, and the full rate in the pound payable by the occupier, and the name of the occupier, should be entered in the rate book. Then comes the one exception in the words which I have already quoted at the outset of my judgment, namely, "Where the dwelling-house or tenement shall be wholly let out in apartments or lodgings not separately rated, the owner of such dwelling-house or tenement shall be rated in respect thereof to the poor rate."

It appears to me that this excepting clause conveys a reasonably clear meaning. The Legislature thereby ordains that, whereas by the immediately preceding context of this s. 7 it has been enacted generally that in parliamentary boroughs it is the occupier and not the owner who shall henceforward be rated to the poor rate, nevertheless, in the one particular case specified in this excepting clause, it is the owner and not the occupier who shall be rated. The only apparent ambiguity requiring interpretation lies in the language of the description of the excepted case, "not separately rated." This difficulty has been cleared away by the considered judgments in *Stamper* v. *Overseers of Sunderland*. (1) It is needless here to repeat their careful reasoning. It is sufficient to repeat their conclusion in the language of Montague Smith J. (2): "The words 'not separately rated' are satisfied by holding them to mean 'not separately rated at the time of the passing of the Act.'" The whole section then may be thus paraphrased: Prior to the passing of this Act there have been cases in which (as, e.g., under the Acts of

(1) L. R. 3 C. P. 388. (2) L. R. 3 C. P. at p. 404.

1819 and 1850 and special local Acts) the owner of a dwelling-house or of a tenement has been rated or has been liable to be rated. In all parliamentary boroughs this state of things shall cease, and henceforward in respect of all dwelling-houses and tenements in such boroughs the occupier shall, and the owner shall not, be the person rated. The only exception shall be this: Wherever a dwelling-house or tenement shall be found to fulfil two conditions—(*a*) that it is wholly let out in lodgings or apartments; (*b*) that those apartments or lodgings were not separately rated at the time of the passing of this Act—in such case the owner and not the occupier shall be rated in respect of such dwelling-house or tenement.

The appellants—that is, the owners—appeared to base an argument upon the fact that the words which in the one particular case prescribe the rating of the owner take the form of an exception. They contended that it was therefore not a "substantive" enactment. I do not accept their reasoning. This provision as to the rating of owners was properly expressed in the form of an exception from the general rule which precedes it, because it was intended thereunder to affect (though not, I think, exclusively) cases which but for such a provision would have been governed by the preceding general ordinance as to rating occupiers, i.e., cases in which the occupiers of the lodgings or apartments in the house wholly let out in such lodgings or apartments were not mere lodgers, but might be rated as inhabiting occupiers. This is pointed out by Jessel M.R., in his judgment in *Bradley* v. *Baylis* (1), and by Brett L.J. (2) But, in my judgment, this provision is none the less on this account a substantive enactment, as I understand the proper meaning of that expression. It made an entirely new law in regard to the rating in the future of certain premises which were thereby for the first time classified for rating purposes—dwelling-houses or tenements wholly let out in lodgings or apartments not separately rated at the time of the passing of the Act. It is not a mere retention, by way of exception, of existing law in respect of such premises. The classification which this provision creates was not a classification according either to the general Acts of 1819 and 1850, or, so far

(1) 8 Q. B. D. at p. 216. (2) 8 Q. B. D. at p. 237.

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as I am aware, to any of the local Acts which were in force in some boroughs, or, indeed, to any existing statute, local or general. It is upon its face wholly independent of rental value, whereas under the Acts of 1819 and 1850, and, speaking generally, under the local Acts also, the power, by order of the vestry or by agreement with the owner, to rate the owner instead of the occupier depended upon a low rental value, according to the standard prescribed by the particular statute. This provision is, in clear terms, compulsory, whereas those other Acts were permissive; it is of universal application in all parliamentary boroughs, whether they had or had not availed themselves of the Acts of 1819 and 1850, or were or were not possessed of local Acts permitting in certain specified cases the rating of owner instead of occupier.

It appears to me that, inasmuch as the facts stated in this special case shew that in every instance to which the case relates the premises in respect of which the respondents claim to rate the appellants as owners come within the classification of this s. 7 as dwelling-houses or tenements wholly let out at the time of the making of the rate in apartments or lodgings which were not separately rated at the time of the passing of the Representation of the People Act, 1867, the respondents, i.e., the borough council, are entitled to succeed, unless the appellants can shew that the portion of s. 7 of that Act which prescribes the rating of the owner in such a case has been, either expressly or according to proper and necessary implication, repealed by the later legislation. In my opinion they cannot do so; and it is unnecessary for me to decide whether the respondents' contention gains force inferentially from the terms of the Parliamentary and Municipal Registration Act, 1878, s. 14, and the Representation of the People Act, 1884, s. 9, to which Mr. Montague Lush and Mr. Ryde called our attention. I will say only that the former of these two statutory enactments does appear to me, in connection, as I shall hereafter point out, with the legislation of 1869, in some measure to help their argument.

Before coming to the conclusion which I have stated I have, of course, most carefully considered the judgments delivered by the

members of the Divisional Court in *Davis* v. *Wallis*. (1) The appeal in the present case is really an appeal from that decision, because the Divisional Court, in deciding in favour of the appellants in the case before us, has simply followed, as it was bound to do, the judgment of the Divisional Court in that earlier case, which was in all material respects identical with the present. I will as briefly as possible say why, with great respect, I am unable to agree with that decision.

It is based, if, as I hope, I correctly appreciate the reasoning of Lord Alverstone C.J. and A. T. Lawrence J. (with whom Sutton J. concurred), upon two considerations. They both hold s. 7 of the Representation of the People Act, 1867, to be unrepealed; but they hold, at the same time, that its provisions do not apply to such a case as the present, because that Act is, in the language of the Lord Chief Justice, "not to be regarded as a rating Act." Further, they hold—and I again quote the language of the Lord Chief Justice—that "when the question is as to the rating of owners, and their rights and liabilities when rated, the statute to be considered is not the Representation of the People Act, 1867, but the Poor Rate Assessment and Collection Act, 1869."

In regard to the first of these two grounds, it appears to me that, if a statute plainly and distinctly enacts that for the future, in regard to a particular class of tenement, the owner shall be rated to the poor rate, the fact (to put a purely hypothetical case) that it appears from the same statute that the Legislature placed such an enactment as to rating in the statute either in order to exclude the occupiers of such tenements from the franchise, or for any other purpose connected with the franchise based upon rating which it was the principal purpose of the statute to create, affords no justification for the Court treating the enactment as a nullity when it is called upon to decide whether the owner of such a tenement is or is not legally rated to the poor rate in respect of it. The ulterior reason which moved the Legislature to impose a rate upon the owner in the particular case, whether appearing from other parts of the same statute or in another and separate statute, appears to me to be immaterial. One might test the matter in this way.

(1) [1908] 2 K. B. 134.

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Suppose that after the passing of the 1867 Act Parliament had in 1868 changed its mind, and passed an Act substituting manhood suffrage for the rating basis of 1867 and repealing the franchise sections of the 1867 Act, but leaving the rating provisions in s. 7 of the Act of 1867 unrepealed, could it have been rightly argued that those rating provisions had ceased to be in force because the franchise sections of the Act of 1867 had been done away with? I am unable, looking at the plain terms of s. 7 imposing the rate in all parliamentary boroughs generally upon the occupier, but in one particular case upon the owner, to accept the view, expressed by A. T. Lawrence J. in the course of his judgment, that this Act contains no provision leading to the suggestion that it is an Act intended in any way to affect the liability of the owner on its collection.

I am glad, as there is a difference of opinion, to be fortified by the judgment of A. L. Smith J. in *Allchurch* v. *Assessment Committee and Guardians of Hendon Union.* (1) That was a rating case in which sub-s. 2 of this same s. 7 had to be considered. And there, as in the present case and as in *Davis* v. *Wallis* (2), an argument was presented to the Divisional Court (whose judgment was affirmed by the Court of Appeal) that the Representation of the People Act, 1867, did not apply in any way to rating, but only to the right of franchise. But A. L. Smith J. in the course of his judgment (3) explicitly rejected such a contention, and said: "It has been argued for the appellants that the Acts of 1867 (30 & 31 Vict. c. 102) and 1878 (41 & 42 Vict. c. 26) only affect the question of voting, and not of rating; but I cannot agree with that contention." And in the course of his judgment in *Bradley* v. *Baylis* (4) Lindley L.J., dividing the enactments of the Representation of the People Act, 1867, the Poor Rate Assessment and Collection Act, 1869, and the Parliamentary and Municipal Registration Act, 1878, into two groups—a qualification group and a rating group—distinguishes this 7th section from the other portions of the first-named Act as belonging to the rating group. It seems to me that that section is a substantive rating enactment.

(1) [1891] 2 Q. B. 436.
(2) [1908] 2 K. B. 134.
(3) [1891] 2 Q. B. 436, at p. 439.
(4) 8 Q. B. D. at p. 243.

The second consideration which weighed with the Divisional Court in *Davis* v. *Wallis* (1) in favour of the side which in the case before us is represented by the appellants was that the Poor Rate Assessment and Collection Act, 1869 (32 & 33 Vict. c. 41), virtually superseded, though it did not repeal, s. 7 of the Act of 1867, so far as that section enacted the rating of owners. "I think," said the Lord Chief Justice (2), "that the position of owners who are to be rated instead of the occupiers of hereditaments is now governed by the Poor Rate Assessment and Collection Act, 1869, and not by the Representation of the People Act, 1867, and that the claim of the appellants to rate the respondent under s. 7 of the Act of 1867 is one that cannot be supported."

Now it is true that the Act of 1869 by ss. 3 and 4 greatly modified a portion of s. 7 of the Act of 1867. But the portion which is modified is not the portion of s. 7 which enacted in regard to a special class of tenant the rating of the owner, but the earlier portion of s. 7, in which it was provided as a general rule that in all parliamentary boroughs the occupier should be rated. The result of that enactment had been that a multitude of occupiers—often under tenancies for short terms of weeks or months—of tenements of small rateable value, the rates for which, previously to the Act of 1867, were collected from and paid by the owners, had been required by the rate collector to pay the rates, and summonses had been served upon, I believe, thousands of such occupiers for the non-payment of rates; and from the poorer class of inhabitants in great towns who occupied small tenements had gone up a loud and bitter cry of complaint. The Legislature met this particular grievance by enacting in s. 3 of the Act of 1869 that in the case of rateable hereditaments whose rateable value did not in the case of London exceed 20*l.*, in the case of Liverpool 13*l.*, in the case of Manchester or Birmingham 10*l.*, and in the rest of the country 8*l.*, the owner of the hereditaments might upon certain conditions enter into a written agreement with the overseers to be rated and to pay the rate; and by enacting in s. 4 that the vestry of a parish might order

(1) [1908] 2 K. B. 134. (2) [1908] 2 K. B. at p. 150.

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that the owners of all rateable hereditaments, which included a dwelling-house, and which did not exceed in rateable value the limits mentioned in s. 3, should be rated instead of the occupiers. Both under s. 3 and s. 4 pecuniary advantages were offered to the ratepaying owner. At the same time, in other sections of the Act the Legislature sought to safeguard the franchise of the occupiers by requiring the ratepaying owner of the hereditament to supply to the overseers a list of its occupiers, and by requiring overseers to insert the names of all occupiers in the rate book, and by making other provisions of a supplementary and subsidiary character, to which it would be irrelevant to refer particularly because they do not affect the subject which we are now considering. But with the "excepting" portion of s. 7—the portion with which we are concerned in the present case—enacting the rating of owners, the Act of 1869 does not purport to deal. It does not even refer to the classification of dwelling-houses or tenements wholly let out in lodgings or apartments not separately rated at the time of the passing of the Act of 1867. Its application to tenements of a low rateable value is, in my humble judgment, altogether outside and unconnected with such a classification as that which is specified in s. 7 of the Act of 1867, and which is, as I have already pointed out, wholly independent of either rateable or rental value. It appears to me that the rating of owners of such tenements as are described and separately classified by the excepting part of s. 7 of the Act of 1867 is left untouched by the 3rd and 4th sections of the Act of 1869. It is not easy to believe that the Legislature, which by s. 6 of the Act of 1869 expressly repealed the Small Tenements Act, 1850, with respect to the rating of small tenements, and so much of any local statute as relates to the rating of owners instead of occupiers, intended by mere implication to repeal so salient an enactment as the latter paragraph of s. 7 of the Act of 1867, dealing not only with tenements within but tenements outside the limits of value fixed by ss. 3 and 4 of the Act of 1869. And it is not unworthy of note in this connection that s. 14 of the Parliamentary and Municipal Registration Act, 1878 (41 & 42 Vict. c. 26), seems, in dealing with s. 19 of the Act of 1869, to recognize the existence of a liability of owners in boroughs to

be rated to the poor rate in other cases than those for which ss. 3 and 4 of the Act have provided, and to indicate that it did not regard the Act of 1869 as containing a complete code for the rating of owners.

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In my opinion this appeal should be allowed, and the questions asked in the case should be answered in favour of the appellants, as has been explained in the judgment of Buckley L.J.

Appeal allowed.

Solicitor for Islington Borough Council: *A. M. Bramall.*
Solicitor for appellants: *A. E. Roberts.*

W. J. B.

[IN THE COURT OF APPEAL.]

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MULROONEY *v.* TODD.

Employer and Workman — Compensation — Contract for Execution of Work undertaken by Principal—Local Authority—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 4, *sub-s.* 1; *s.* 13.

A municipal corporation acquired for the purpose of a market a plot of land occupied by a ruinous building, and they accepted an offer by a contractor to purchase the building materials for 15*l.* on the terms of his pulling down the building and clearing the site. A workman employed by the contractor to do the work was killed by an accident arising out of and in the course of his employment, and his widow applied for compensation under the Workmen's Compensation Act, 1906, against both the contractor and the corporation:—

Held, that the contract between the corporation and the contractor was a contract for the execution of work undertaken by the corporation, and that it was entered into by them in the exercise and performance of their powers and duties, and consequently that the corporation were liable as principals under s. 4, sub-s. 1, of the Act.

APPEAL from an award of the county court judge at Bradford sitting as arbitrator under the Workmen's Compensation Act, 1906.

The Bradford Corporation acquired a plot of land adjoining one of their markets for the purpose of extending the market. This land was occupied by the ruins of an old mill which had

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been destroyed by fire, and the corporation were desirous of clearing the land. Accordingly they advertised for a person to purchase the bricks and pull the mill down and remove all rubbish from the site. This advertisement was answered by G. Todd, a coal merchant and carting agent, who on February 11, 1908, wrote to the chairman of the building committee as follows :—

"Dear Sir,—I have looked over the old mill at Market Tavern, St. James Market. Your committee defines all the old material from top down to sills in two side elevations and to bottom storey course in front which means about three storeys. It is very inconvenient with cellars been [*sic*] below the road which will necessitate a lot of labour in getting unto road. Your building contains about 1000 load which will mean something like 300 load of rubbish to take away at probably a cost of 3*s.* per load. The ashes [*sic*] (1) is of little use for light buildings so that there is really old wall stones and brick. Removing rubbish will entail a cost of 50*l.* and 1000 yards pulling down almost another 50*l.* besides expense in carting and stacking to old wall stones and brick. I therefore submit for your committee's consideration the sum of 15*l.* subject to me undertaking to remove all rubbish away from the site according to your committee's instructions.

"Believe me,

"Yours respectfully,

"G. Todd.

"To Mr. A. Gadie, Chairman, Building Committee."

This offer was verbally accepted, and Todd paid the money to the corporation and obtained a receipt for it. In the course of pulling down the building a workman employed by Todd to assist him in clearing the site was killed by an accident. His widow applied for compensation against both Todd and the corporation.

The learned county court judge held, upon the construction of s. 4, sub-s. 1, of the Workmen's Compensation Act, 1906, as applied by s. 13 to municipal corporations, that the contract

(1) Probably "ashlar" was meant.

between Todd and the corporation was a contract made in the course of or for the purposes of carrying out the powers and duties of the corporation and was a contract for the execution of work undertaken by the corporation, who were therefore principals within s. 4, and he made an award of 185*l.* against both the respondents, but declared that the corporation were entitled to be indemnified by Todd.

The corporation appealed. There was no appeal by Todd.

C. A. Russell, K.C., and *F. Wood*, for the corporation. The question is whether the corporation are liable as principals within s. 4, sub-s. 1, of the Workmen's Compensation Act, 1906, having regard to the definition in respect of corporations in s. 13.

(1.) This is not a contract for the execution of work within s. 4, sub-s. 1, but is a contract for sale, whether of goods or land was at one time the subject of a conflict of judicial opinion: see *Marshall* v. *Green* (1); *Lavery* v. *Pursell* (2); but that doubt has now been set at rest by the Sale of Goods Act, 1893, which defines goods as including "emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale, or under the contract of sale." This, then, is a contract for the sale of goods within the Sale of Goods Act, 1893. It frequently happens that in this class of contract a considerable amount of labour is required to obtain delivery, and in this case the contract to pull down is merely incidental to the nature of the purchase. Take for example the analogous case of a contract to purchase a growing crop of potatoes. The contract is a contract of purchase and the digging up of the potatoes is the particular mode of taking delivery.

(2.) This was not work undertaken by the corporation. The work was done by Todd for himself, not for the corporation.

(3.) It was not a contract entered into by the corporation in the exercise and performance of their powers and duties. The language of s. 13 is powers *and* duties. It is necessary in order to make the local authority liable that the contract should be entered into in the performance of some positive duty, but the corporation were under no duty to remove this rubbish. The

(1) (1875) 1 C. P. D. 35. (2) (1888) 39 Ch. D. 508.

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learned county court judge was therefore wrong in holding the corporation responsible.

Watson, for the applicant, was stopped.

COZENS-HARDY M.R. This, so far as I know, is the first case which has come before the Court of Appeal upon s. 4 of the Workmen's Compensation Act, 1906. It is a section which is not altogether easy to construe, although in the present case I have satisfied myself what ought to be done. First of all let me state the facts apart from the law. The corporation of Bradford are not an ancient common law corporation possessed as such of property of their own, but a modern corporation constituted by the Municipal Corporations Act. They have very wide statutory powers and duties. They own markets—I do not propose to refer to the provisions of the particular Act or Acts which confer these powers upon them, but they own markets. Immediately adjoining one of these markets was a building which was burnt down, and the corporation purchased this building. Mr. Russell, who has argued this case with his usual fairness, accepts the view that the justification, and the only justification, of the corporation in buying this building was in their position as market authority and for the purpose of their market. The land was acquired for market purposes; it could only have been made use of for market purposes by removing the wreck of the fire and clearing the ground so that it might be available for such buildings as the corporation's building committee might think fit to erect for market purposes. In these circumstances this letter was written by Todd. [The Master of the Rolls read the letter of February 11, 1908.] That letter was addressed to the chairman of the building committee. The offer contained in the letter was verbally accepted. Todd engaged some men to help him in the work of clearing the site, and in the course of doing the work a man, who I gather was knocking to pieces one of the walls, fell and was killed. In these circumstances the representative of the workman applied under the Act for compensation against both Todd and the corporation. This case must not be referred to as either holding or denying that both these parties were properly

made parties. That point has not been raised and will not be covered by our decision. But it is said that under s. 4 of the Act the corporation are liable as principals. That depends upon what is the true construction of s. 4, not in the case of an individual trader, as to which I desire to keep an open mind, but in the case of a municipal corporation. Now there is a peculiar definition in s. 13. "The exercise and performance of the powers and duties of a local or other public authority shall, for the purposes of this Act, be treated as the trade or business of the authority." Reading those words into s. 4, sub-s. 1, of the Act, it would run thus: "Where any person"—that is, the local authority—"(in this section referred to as the principal), in the course of or for the purposes of the exercise and performance of his powers and duties, contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work undertaken by the principal, the principal shall be liable to pay to any workman employed in the execution of the work any compensation under this Act which he would have been liable to pay if that workman had been immediately employed by him; and where compensation is claimed from or proceedings are taken against the principal, then, in the application of this Act, references to the principal shall be substituted for references to the employer, except that the amount of compensation shall be calculated with reference to the earnings of the workman under the employer by whom he is immediately employed: Provided that, where the contract relates to threshing, ploughing, or other agricultural work, and the contractor provides and uses machinery driven by mechanical power for the purpose of such work, he and he alone shall be liable under this Act to pay compensation to any workman employed by him on such work." It is argued on behalf of the workman's representative, and the learned county court judge has taken this view, that under the language of this section, taken with the interpretation clause, this was work which the corporation as principals undertook in the execution of their powers and duties, and for that purpose employed Todd as contractor. If s. 4, sub-s. 1, stood alone without the proviso, I think that there would be great force

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in the contention that the section was intended to operate only in cases where you had first a contract and then a sub-contract, and the marginal note to the section lends colour to that view. But that view is impossible, and it was admitted to be impossible, when the section is read as a whole with the proviso as regards agricultural work, for which the farmer is never a contractor. The argument which has been addressed to us has been mainly this. It has been contended that this was really a contract for the sale of goods having regard to s. 62 of the Sale of Goods Act, 1893. I am not sure that it may not be a contract for the sale of goods, but I think, having regard to the whole transaction, it was not primarily a contract for the sale of goods. It was a contract entered into by the corporation with Todd in order that the site might be utilized for the purposes of their market, and in order to achieve that they said that Todd might have all the materials, he undertaking to clear the site, and, as the materials were worth more than the cost of the labour, he was to pay them 15*l.* in addition. I do not regard this as an ordinary contract for the sale of goods where the purchaser has to remove the goods from off the premises. I think there was an express obligation here binding Todd to remove the bricks and clear away the rubbish. That was the primary intention of the contract, and that Todd was to be entitled to keep the bricks was only one element in the payment for the work that he undertook to do on behalf of the corporation. It seems to me that this was work undertaken by the corporation, and it was done by virtue of the contract made with Todd for that purpose.

Then it is said that this was not done by the corporation in exercise and performance of their powers and duties—that is to say, the section has no application except in the case of positive duties enforceable, I presume, by mandamus. I do not think that the words can be so interpreted. I think that when a corporation having power to do or not to do a thing determine to do it, that is a matter which comes within those words. I entirely decline to limit the words in the way suggested. That is, in substance, the view taken by the learned county court judge. I agree with that view, and I think that the appeal must be dismissed with costs. I have intentionally avoided dealing

with the case of a trader. It seems to me that there may be more difficulty in the case of a trader than in the case of a corporation, which is governed by s. 13.

FLETCHER MOULTON L.J. I am of the same opinion. The very able argument of Mr. Russell in this case rested on a method of advocacy which is very apt to mislead the Court and against which we have to be on our guard. With great skill he shewed that this contract could be regarded as a contract for the sale of goods, and thereupon he took a variety of well-chosen instances of contracts for the sale of goods and treated them as parallel cases to the contract in the present case. The fallacy lies in this: A contract may well be a contract for the sale of goods, but at the same time be not merely a contract for the sale of goods. It may be a complex contract; it may be a contract for the sale of goods and also a contract for work to be done. When one reads the letter which forms the contract in this case it is impossible, I think, to escape the conclusion that it is a contract to do work on terms involving the transfer of property in chattels. The fact that it includes a transfer of property in chattels may well constitute it a contract for the sale of goods but it does not prevent it being also a contract for work. (1) This type of contract is very common. You see it in cases where a man is employed by a local authority to take away dust and household refuse on terms which include a stipulation that the stuff shall belong to him. No doubt such an agreement is a sale to him of the dust and household refuse, but it is none the less a contract to do work. The thing which was most in the mind of the local authority in the present case was evidently the clearing of the site, and as payment for the clearing of the site they were willing to allow Todd to keep the whole of the building materials removed therefrom at the price of 15*l.* Todd was only to pay 15*l.* for property which was worth 115*l.* because he undertook to do the work necessary to clear the site which was estimated as being worth 100*l.* It would make no difference

(1) *Quære* whether the agreement did not take effect by way of licence, as in the case of food or fuel consumed by a guest at an inn. See Vaughan 351, and per Romer L.J. in *Frank Warr & Co.* v. *London County Council*, [1904] 1 K. B. at p. 721.—F. P.

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to the nature of the contract whether it was to be Todd or the building committee who were to pay the 15*l.* The only difference would be that in the one case the property would be worth 15*l.* more and in the other case 15*l.* less than the cost of clearing the site. Therefore I am satisfied that this is a contract for work, and that the Act applies to the case. With regard to the second point one has only to read the definition in s. 13 with respect to local authorities into s. 4, sub-s. 1, to see that this case comes within that sub-section. I will leave open the case of an individual trader until it becomes necessary to decide it.

FARWELL L.J. I am of the same opinion. I will assume that Mr. Russell is right in saying this is a contract for the sale of goods with all its consequences. It is a contract in consideration of another contract expressed in the letter. After stating that the building contained about 1000 loads, which would mean something like 300 loads of rubbish to be taken away, it continues, "Removing rubbish will entail a cost of 50*l.* and 1000 yards pulling down another 50*l.*" It is plain to my mind that the contract was on the terms of the builder being bound to remove the building, the builder to have the rubbish; it is therefore a contract for the sale of goods in consideration of a contract for the execution of work, and therefore I think that this action can be maintained. On the other point I agree that the powers and duties of the corporation mentioned in s. 13 include all those duties which are discretionary as well as those which are absolute. A local authority has absolute and discretionary duties. When it exercises its discretion by determining that certain work ought to be done, it becomes its duty to carry out that work—the discretion has merged in the duty. To take a familiar instance from the Chancery Division. Costs are in the discretion of the judge. The judge is not bound to make an order depriving a man of his costs, but if in his discretion he thinks it right to do so it becomes his duty to do so, and he does so in the exercise of his powers and duties. The words which have caused me a difficulty are these: "Where any person (in this section referred to as the principal), in the course of or for the purposes of his

trade or business contracts with any other person (in this section referred to as the contractor) for the execution by or under the contractor of the whole or any part of any work undertaken by the principal." When the question arises with regard to an individual trader we will consider it, but as applied to a corporation these words can only mean work undertaken by a corporation in the exercise of its powers and duties. I agree that this appeal ought to be dismissed.

Appeal dismissed.

Solicitors: *Cann & Sons, for Frederick Stevens, Town Clerk, Bradford; Wrensted, Hind & Roberts, for Scott, Eames & Mossman, Bradford.*

H. B. H.

[IN THE COURT OF APPEAL.]

PORTON *v.* CENTRAL (UNEMPLOYED) BODY FOR LONDON.

Employer and Workman — Compensation — Unemployment — Provision of Temporary Work—Contract of Service—Unemployed Workmen Act, 1905 (5 *Edw.* 7, *c.* 18), *s.* 1, *sub-ss.* 3, 5, 7—*Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *ss.* 1, 13.

A man employed upon temporary work by the Central (Unemployed) Body for London under the provisions of the Unemployed Workmen Act, 1905, was killed by an accident arising out of and in the course of his employment. Upon granting his application for work the Central Body supplied him with a circular containing the conditions of employment:—

Held, that the deceased was a workman employed by the Central Body under a contract of service within the Workmen's Compensation Act, 1906, and that his widow was entitled to compensation.

APPEAL from an award of the judge of a county court sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant was the widow of Albert G. Porton, who at the date of his death was employed by the Central (Unemployed) Body for London under the provisions of the Unemployed Workmen Act, 1905. In January, 1908, the deceased, who was a parishioner of Kensington, being out of work, applied for work

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to the Kensington Distress Committee. The Kensington committee, having satisfied themselves of the propriety of the application, referred the case to the Central Body, who detailed the man to certain work on Hampstead Heath.

The deceased was supplied through the committee with a leaflet headed "The Central (Unemployed) Body for London" and intituled "Conditions of Employment in the London County Council Parks Season 1907-1908." It stated the hours of employment, the time allowed for dinner, and the rate of wages, and provided for the payment of travelling expenses and for the deduction of time lost through bad weather in certain events. It further stated that each man would receive from the distress committee a card containing name and particulars signed by the local secretary, and that a pay ticket would be given to each man on Friday, which must be produced at the time and place appointed by the distress committee for the payment of wages.

The deceased was also supplied with an employment card which contained his name and address and specified the works on which he was to be employed, the rate of pay per hour, and the date and hour of the commencement of work. On April 29 the deceased, while employed as above stated, went to a temporary latrine consisting of a bar with a trench below, and while there was seized with an epileptic fit and fell into the trench. When he was pulled out he was covered with filth and could not speak. He was taken to the ambulance and died on the same day. The deceased had been subject to epileptic fits for many years. At the date of his death he had been employed by the Central Body for thirteen weeks at an average weekly wage of 18*s.* 3¼*d.* The medical evidence was to the effect that the deceased would probably have recovered if he had not fallen into the filth. The county court judge found (1.) that the deceased died from injuries caused by an accident and (2.) that the accident arose out of and in the course of his employment, and held that the Central Body were the employers of the deceased and that he was working under a contract of service with them within s. 13 of the Workmen's Compensation Act, 1906; and he assessed the compensation at 150*l.*

The Central Body appealed.

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Ellis Hill, for the Central Body. (1.) Employment by the Central (Unemployed) Body under the Unemployed Workmen Act, 1905, is not employment under a contract of service within the Workmen's Compensation Act, 1906, but is in the nature of administrative relief. The Workmen's Compensation Act only contemplates a case where there is a free choice on each side. The Central Body did not want to employ the man, and the man was obliged to take any work that was offered. Compensation depends upon wages, but this man had no real market value. The Unemployed Workmen Act, 1905, clearly regards the provision of temporary work as prima facie in the nature of poor law relief, because it expressly stipulates that it shall not disqualify the man from voting: s. 1, sub-s. 7. That stipulation would be useless on any other hypothesis. This case is on all fours with *Tozeland* v. *West Ham Union*. (1)

(2.) Death was not the result of the accident. The proximate cause of death was the epileptic fit.

(3.) The accident did not arise out of the employment.

P. T. Blackwell and *Martin O'Connor*, for the applicant, were not called upon.

COZENS-HARDY M.R. I think this is a plain case. It is an application by the representatives of a deceased workman who was doing work for the Central (Unemployed) Body for London. That is a body created by statute and expressly empowered by statute (amongst other things) to provide work for the unemployed. The scheme is rather complicated. The distress committees receive applications from men who desire work (s. 1, sub-s. 3). They refer the matter to the Central Body, and the Central Body, if they think fit, are expressly empowered to provide work (s. 1, sub-s. 5). Now in the present case the deceased man Porton was examined by the Kensington committee. That committee thought he was a deserving man—I mean not an impostor, but a man really unemployed, though he was desirous of getting work which he could not obtain. They sent him on to the Central Body, and the Central Body, having his application and, doubtless, some or many others before them,

(1) [1907] 1 K. B. 920.

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put him to work somewhere in the northern suburbs of London. While there he met with an accident—I assume for the present purpose it was an accident arising out of and in the course of his employment—which caused his death. It is said by counsel for the appellants, who has urged every possible point, that the relation of employer and workman did not exist here, because it was not a matter of free choice on either side; that the Central Body could not go into the labour market and get any man they liked, but were practically if not expressly limited to such applicants as were sent to them by the distress committee, and that the man himself was not a free agent because he was so hard up that he was ready to take anything that offered. I can see no foundation for that argument in either of its branches. The Central Body exists for the very purpose of providing work in proper cases. I have no doubt that they exercised their discretion with propriety and employed Porton because he was a man coming within the class of persons whom they were authorized to employ and they thought it was a reasonable case. Porton, on the other hand, was in no way bound to come to them. He was hard up, no doubt, in the sense that he might have been willing to take work under rather more disadvantageous conditions than he would have done at other times. What has that to do with it? We have here a document which states the conditions of employment. It is headed "Central (Unemployed) Body for London." It states the hours of labour; it states the time allowed for dinner out of those hours; it states the rate of wages per hour, and it states that travelling expenses to a certain extent will be paid if previously sanctioned; then it says what deduction is to be made for lost time. The man accepts the employment; he is employed for a considerable time, and the average wages extending over that time amounted to 18*s.* or rather more per week. We are asked to say that that did not create the relation of employer and workman between the Central Body for London and this man. If it was not a contract of employment I cannot imagine what it was. I know no other words to describe it. It certainly was not charity; it certainly was not poor law relief. Sect. 1, sub-s. 7, if there were any doubt about it, negatives any such idea. It

seems to me to be a plain case in which the Central Body were the employers and the deceased man was a workman within the definitions in the Workmen's Compensation Act. That being so, the liability of the Central Body cannot be disputed, unless on the ground that this was not an accident arising out of and in the course of the employment. On that point it has not been seriously contended that there was not evidence on which the learned county court judge could have found that it was. We do not sit here as judges of appeal on matters of fact. I do not myself desire to express any opinion adverse to the finding of the county court judge on this point. It is sufficient for me to say that it is not a point which we ought to consider when once we are satisfied that there was evidence upon which it was competent for him to arrive at that conclusion. I have read with great care the judgment of his Honour Judge Selfe; it is an admirable judgment to which I do not feel I can add anything. I think that this appeal ought to be dismissed with costs.

FLETCHER MOULTON L.J. I am of the same opinion. To my mind it is clear that the intention of the Legislature was to constitute this Central Body as a body empowered to employ at wages those who were in a destitute condition. They did employ this man at wages, and the scheme of the Workmen's Compensation Act, to my mind, makes compensation for accidents almost inseparable from wages, and certainly inseparable from a contract of service, which I think existed here.

FARWELL L.J. I agree and have nothing to add.

Appeal dismissed.

Solicitors: *Watson, Sons & Room; Blackwell & Co.*

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[IN THE COURT OF APPEAL.]

SCHOFIELD *v.* ORRELL COLLIERY COMPANY, LIMITED.

Employer and Workman—Compensation—Dependant—Posthumous Illegitimate Child—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *ss.* 1, 13.

A posthumous illegitimate child of a workman may be a dependant within the Workmen's Compensation Act, 1906.

Accordingly where a workman was killed by an accident arising out of and in the course of his employment some months before the birth of an illegitimate child, the paternity of which he admitted, and it was proved that he was engaged to be married to the mother and intended to provide for the maintenance of the child, and the accident occurred very shortly before the date fixed for the solemnization of the marriage:—

Held, applying the principle of *Williams* v. *Ocean Coal Co., Ld.*, [1907] 2 K. B. 422, that the child was entitled to compensation as a dependant.

Appeal from an award of the Wigan county court judge under the Workmen's Compensation Act, 1906.

In 1905 Lawrence Colclough, a collier in the employment of the respondents, went into lodgings at Newtown, and shortly afterwards he began to pay court to his landlady's daughter, who was a mill-hand earning about 14*s.* a week. Towards the end of 1907 the girl discovered that she was with child, and thereupon she and Colclough became engaged to be married. Colclough acknowledged the paternity of the child in the presence of the girl's mother and told her that he did not intend the child to be a chance child, but that he would marry the girl and keep her, and he supplied the girl with money for the publication of the banns. It was arranged that the marriage should take place on December 21, 1907, and that James Winstanley, a collier, should attend the wedding as Colclough's friend. On December 10, 1907, after the banns had been twice published, Colclough was killed by an accident arising out of and in the course of his employment. In May, 1908, the girl gave birth to a male child, who was named Lawrence Schofield Colclough. The infant child applied (by Winstanley as his next friend) as a dependant of the deceased for compensation against the respondents.

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The learned county court judge held that the case fell within the principle of *Williams* v. *Ocean Coal Co., Ld.* (1) and came to the conclusion upon the evidence that dependency was proved, and he made an award in the applicant's favour.

The employers appealed.

C. A. Russell, K.C., and *Rigby Swift*, for the employers. The question in this case is as to the dependency of a posthumous illegitimate child under the Workmen's Compensation Act, 1906. The learned county court judge has based his award upon a misapprehension of *Williams* v. *Ocean Coal Co., Ld.* (1) and has held that as soon as paternity is established dependency arises. It is to be observed that in this case the deceased man was not supporting the mother. In *Williams* v. *Ocean Coal Co., Ld.* (1) there was strong evidence that the wife was not in fact being supported, but that decision was founded upon the legal presumption arising from the relation of husband and wife, and it was held that where there was a legal obligation to support there was a presumption of dependency which must be rebutted by evidence, and that the evidence was not strong enough to displace the presumption; and, further, that the same considerations applied to a posthumous legitimate child. But in that case the right of the child was not considered separately from the right of the mother and the question only became important upon the question of apportionment. The decision proceeded on the theory that the dependency of the mother carried with it the dependency of the child en ventre sa mère. But, assuming that a posthumous legitimate child has an independent right of its own, that depends upon the legal obligation of the father to support his children. Here there is no dependency either in fact or in law. There is no evidence, even treating this child as born, that it would have been supported by the deceased man, and he was under no legal obligation to support it. Therefore there is no presumption of dependency in this case. Under the Poor Law Amendment Act, 1834, the legal liability to maintain an illegitimate child is on the mother, and the father only becomes legally liable on his subsequent marriage with the mother (see ss. 57, 71), and apart

(1) [1907] 2 K. B. 422.

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from poor law legislation the only way in which the father can be made liable is by proceedings under the Bastardy Acts, and no such proceedings have been taken here. Inasmuch as in fact neither directly nor indirectly was the father contributing to the support of this child, and inasmuch as in law it had no right to be maintained by the father, this child was not a dependant within the definition in s. 13 of the Workmen's Compensation Act, 1906, and to hold otherwise would be a violation of the plain language of the statute.

G. A. Scott, for the applicant, was stopped.

COZENS-HARDY M.R. This appeal raises a point which is undoubtedly worthy of careful consideration, but which so far as this Court is concerned must be decided in one way only. The Workmen's Compensation Act, 1906, amongst many peculiarities, has one which, so far as my experience goes, is not to be found in any other Act. For many purposes it puts an illegitimate child in the same position as a legitimate child, and it does that in language which is remarkable. The Act provides compensation in a certain class of events for dependants. "Dependants" are defined in s. 13 as meaning "such of the members of the workman's family as were wholly or in part dependent upon the earnings of the workman at the time of his death, or would but for the incapacity due to the accident have been so dependent," and "member of a family" is defined as including, among others, a son and a daughter. In *Williams* v. *Ocean Coal Co., Ld.* (1) it has been decided by this Court, upon the corresponding provisions of the Act of 1897, that a posthumous child is a dependant within the meaning of the Act and entitled to such benefits as the Act gives. There are undoubtedly difficulties in the conclusion at which we arrived, because it may be said to be, and it is, a straining of the language to say that an unborn child can be wholly or in part dependent on the earnings of the workman at the time of his death. No doubt the present Act contains words which render that conclusion rather easier, "or would but for the incapacity due to the accident have been so dependent," but this Court held

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in language which is not ambiguous that a posthumous legitimate child was a dependant within the Act of 1897. I can find no words in my judgment or in the judgments of the other members of the Court shewing that our decision was based in the least upon the ground that the dependency of the mother was really the dependency of the child who was part of her body at the time of the workman's death. The view of the Court was that the posthumous child had an independent right of its own, the principle being that a child en ventre sa mère is to be deemed to be born so far as is necessary for the benefit of that unborn child. Elsewhere that decision may be questioned, but in this Court it cannot be disputed that an unborn child has an independent right to compensation.

The definition of dependants in the Act of 1906 goes on "and where the workman being the parent or grandparent of an illegitimate child, leaves such a child so dependent upon his earnings . . . . shall include such an illegitimate child." That is to say, the illegitimate child is made a member of the family in the same way and to the same extent as a legitimate child, and I think it follows that a posthumous illegitimate child is made a member of the family to the same extent as a legitimate child actually born at the time of the death. It is idle to say that according to the strict meaning of the words a posthumous child whether legitimate or not was not a dependant at the date of the death. As I have said, our construction was a straining of the language; but I am entirely unable to draw any distinction from the fact that a legitimate child when born would have a right to be supported by the father, whereas an illegitimate child would not have any such right until an affiliation order had been obtained. The question of dependency is a mixed question of law and fact, and the facts of this case support the presumption of dependency. The mother of the child and the deceased were engaged to be married. The deceased avowed the child to be his. He agreed to marry the mother, he paid for the banns, which had been twice published, and the date of the marriage was fixed. The child was not born until some months later. I cannot bring myself to doubt that the father did not intend the child, to use his own words, to be a chance child. He

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intended to make the child legitimate, and, whatever happened, he intended to take upon himself the responsibility for the maintenance of the child. In that sense the child was a member of the family of the deceased and was dependent on the earnings of the deceased. For these reasons I think it is impossible to quarrel with the conclusion of the county court judge and that this appeal must be dismissed with costs.

FLETCHER MOULTON L.J. I am of the same opinion. I should be content to base my decision upon the grounds that the Legislature has made legitimacy immaterial upon the question of dependency, and that, as this Court has decided that a posthumous legitimate child is a dependant, so, legitimacy being immaterial for this purpose, a posthumous illegitimate child is a dependant. But in deference to the extremely subtle and able argument we have heard from Mr. Russell I will state the reasons for my judgment at somewhat greater length. He has skilfully argued that the unborn child, if born, would not have any legal right to support from his father, and that therefore he cannot be said at the present moment to be a dependant in the sense that he is partly dependent on the wages of the deceased. In my opinion the fallacy of that argument is this. The House of Lords in *Villar* v. *Gilbey* (1) decided that, where it is for the benefit of the child, a child en ventre sa mère is taken to be born. Of course an unborn child is not born—it is not an existing person in the ordinary sense of the word. All our statutes are, of course, framed in language suitable to the case of existing persons, and thus the peculiar fiction of law by which a non-existent person is to be taken as existing is not provided for in their language; therefore you can always shew that the language of a statute does not fit the case of the unborn. But that is not the way to consider the language of statutes when you are dealing with cases in which the law has given the same rights to a non-existent child as to an existing child. The true way of interpreting the language of a statute in such a case is to assume that the child is born, and then to draw deductions in the same way as we should in the case of an existing person.

(1) [1907] A. C. 139.

Now, assuming that this child had in fact been born, I have no hesitation in drawing from the facts of this case the conclusion that as soon as he was born he would have been dependent on the earnings of the deceased. I am obliged to put in the words "would have been" instead of "was," not because I am enlarging the operation of the statute, but because I am applying it to a case where by a legal fiction a non-existent child is treated as existing. Therefore, like the Master of the Rolls, I have no difficulty in drawing the inference from the facts of this case that, taking the child to be born, as I think the decision in *Williams* v. *Ocean Coal Co., Ld.*(1) obliges us to do, and as I am very glad to do, he was dependent on the earnings of the deceased, realizing that the word "was" can in his case only mean "would have been." For these reasons I think that Mr. Russell's argument is fallacious and that *Williams* v. *Ocean Coal Co., Ld.* (1) covers this case.

FARWELL L.J. I agree. In my opinion we are bound by the decision of this Court in *Williams* v. *Ocean Coal Co., Ld.* (1), and I am unable to distinguish the principle of that case from the present. Legal liability on the part of the deceased to maintain the child is not essential to dependency under the Act. If the legal liability exists, that is a matter of importance, but it is not the necessary foundation of dependency; otherwise, as the Master of the Rolls has said, the Legislature would not have included an illegitimate child in the category of dependants. As Mr. Russell has pointed out, an illegitimate child is not entitled to be maintained by the father unless and until proceedings have been successfully taken against him under the Bastardy Acts. But that to my mind is immaterial. This Court has held that a posthumous child, because it is for his benefit, is to be treated as though it were in existence before the death of the deceased. Following the reasoning of *Williams' Case* (1), it is then a question of mixed fact and law whether, assuming the child to be born, it was a dependant. The learned county court judge has found that the child was a dependant, and I am not prepared to say

(1) [1907] 2 K. B. 422.

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that there was no evidence upon which he could have come to that conclusion.

Appeal dismissed.

Solicitors: *W. P. Ellen, for Peace & Darlington, Liverpool; Burn & Berridge, for James Wilson, Wigan.*

H. B. H.

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[IN THE COURT OF APPEAL.]

WARNCKEN *v.* R. MORELAND & SON, LIMITED.

Employer and Workman—Compensation—Refusal to undergo Surgical Operation—Discretion—Right to further Compensation—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

Where a workman refuses to undergo a reasonable and safe operation which will relieve or remove his incapacity, his continued inability to work at his trade is the result of his refusal of remedial treatment, and not the result of the original accident, and consequently he is not entitled to further compensation under the Workmen's Compensation Act, 1906.

Rothwell v. *Davies*, (1903) 19 Times L. R. 423, explained and distinguished.

Decision of the majority of the judges in *Donnelly* v. *William Baird & Co., Ld.*, (1908) 45 Sc. L. R. 394, approved and adopted.

APPEAL against the award of the judge of the county court of Bow upon a claim for compensation under the Workmen's Compensation Act, 1906.

The question raised by this appeal was whether the refusal of a workman to undergo a simple operation disentitled him from claiming further compensation for continued incapacity caused by an accident for which the employers had already admitted liability.

The facts as found by the county court judge were as follows:—

In February, 1907, the applicant, a workman in the employment of the defendants, a firm of engineers, met with an accident in the course of his employment and injured his right foot, which was treated in hospital, with the result that after two or

three small operations the second toe and part of the big toe were removed. The workman continued to suffer pain, and the X rays shewed that there was a piece of bone detached from the bone of the big toe at the time of the accident, which was now loose in the stump of the big toe. The employers paid the workman compensation at 14*s.* 10*d.* a week from the date of the accident up to the end of January, 1908, when light work was offered him and refused; compensation was then stopped.

In March, 1908, arbitration was demanded.

On May 1, the day fixed for hearing the arbitration, an agreement was come to between the applicant and his employers, and the applicant received 10*l.* 7*s.* 8*d.*, being arrears of compensation at the rate above to May 4, 1908. By this agreement the employers, R. Moreland & Son, Limited, agreed to pay the applicant weekly compensation at the rate of 14*s.* 10*d.* to May 4, 1908, and the applicant agreed to forthwith submit himself to examination in consultation by his own doctor and the employers' doctor, and to do what they advised him. In the meantime the weekly payments were to be continued at the rate aforesaid, so long as the applicant followed the doctors' advice and continued to be incapacitated for work; but in the event of his not doing what the doctors advised him no further compensation was to be paid to him pending a reference to the judge. On May 5, the applicant was again examined by the doctors named in the agreement, and both these gentlemen advised him to submit to an operation for the purpose of removing the detached piece of bone in the stump of the big toe. On May 26, the applicant's solicitors, by letter of that date, informed the respondents that the applicant refused to undergo the operation, and the request for arbitration was restored to the list. All the medical witnesses called were of opinion that the applicant ought in his own interest to submit to the operation. The learned county court judge found that the operation was of a simple character, involving a risk which was hardly appreciable. The applicant was a man of thirty years of age and seemed to be (and no evidence was given to the contrary) in good health. He also found that it was doubtful if the applicant's toe would ever recover without an operation, and then only by the applicant

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having the strength of mind to incur considerable pain in using it, in which strength of mind he seemed to be wanting. He also found that the operation was one which any man of ordinary nerve would submit to in his own interest. On these findings the county court judge, feeling himself bound by the decision of the Court of Appeal in *Rothwell* v. *Davies* (1), made an award in favour of the applicant for a continuance of the weekly payments, though he stated in his judgment that but for that decision he should have followed the case of *Donnelly* v. *William Baird & Co., Ld.* (2), and his own view of the law, and found in favour of the employers.

The employers appealed.

Shakespeare, for the appellants. The Act must be construed reasonably, and if a man unreasonably refuses to undergo a simple operation like the present his incapacity must be attributed to his refusal to avail himself of a reasonable remedy, and not to the original accident, and therefore he is no longer entitled to further compensation. In *Rothwell* v. *Davies* (1), which the county court judge seemed to think took away from him all discretion in the matter, it would seem that the operation was attended with risk.

[The Court sent for the original judges' notes in that case, with the result stated in the judgment.]

The Courts in Scotland have held that a workman who refuses to undergo a simple operation has precluded himself from any right to receive further compensation: *Anderson* v. *Baird & Co., Ld.* (3); *Sweeney* v. *Pumpherston Oil Co.* (4); *Donnelly* v. *William Baird & Co., Ld.* (2) On the facts of this case it seems clear that this workman is unreasonably refusing to undergo a very trivial operation; he has therefore no right to further compensation.

A. Powell, K.C., and *Poley*, for the respondent, the workman. *Rothwell* v. *Davies* (1) is in any view not binding on this Court, and the further investigation of the facts seems to shew that it is distinguishable. The accident caused the injury; a man cannot be

(1) 19 Times L. R. 423.
(2) 45 Sc. L. R. 394.
(3) (1903) 40 Sc. L. R. 263.
(4) (1903) 5 F. 972; 40 Sc. L. R. 721.

compelled to undergo an operation; any operation must always be attended with some risk. If the man died under an operation his dependants would not get compensation.

COZENS-HARDY M.R. This case undoubtedly raises a point of interest and importance, its main importance being that it affords an opportunity for this Court of really setting right a certain misapprehension of what was decided by the Court of Appeal in *Rothwell* v. *Davies*. (1) That case is very inadequately reported, but we have sent for the original papers, and, with those before us, I have not the smallest doubt that the decision was absolutely correct and in no way inconsistent with anything I desire to decide here. In *Rothwell* v. *Davies* (1) the employers applied to stay the weekly payments, and the application was dismissed with costs. The county court judge, according to the notes, there said, "I find that the incapacity has not ceased, but I find that the respondent has acted reasonably"; and we also have a note of the evidence of the doctor, who was the surgeon to the borough hospital where the man was, and under whose care he was. The doctor describes the nature of the operation and says that it was an operation attended with considerable risk. It might be a risk to life. "I would not on any account have this operation performed on me were my hand in this state. I have advised the respondent to have it done under conditions, not otherwise. Without an operation there is no risk; with it there is a very definite one. I think if the operation was successful it would incapacitate him for at least twelve months." So that his own doctor said it was an operation likely to involve risk to life. The learned county court judge found that the man had acted reasonably in saying he would not undergo it, and, that being so, I do not wonder that the then Master of the Rolls began his judgment by saying that this was a perfectly hopeless appeal. Then he went on to say that "there was nothing in the Act which imposed on the workman an obligation to submit to a surgical operation which would be attended with some risk, and some said with serious risk. He could not understand how any judge could possibly be expected to take upon himself the responsibility

(1) 19 Times L. R. 423.

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of ordering a man to undergo such an operation, and he was surprised that such an appeal had been brought."

I cannot take that case as lending any support whatever to the suggestion that a man may decline to submit to a trivial operation not involving any serious risk, but of such a nature that any reasonable man would in his own interest undergo it. I do not understand how any one can doubt that under the present circumstances the true inference of fact is that the continuance of the incapacity is not due to the original accident, but is due to this workman's unreasonable refusal to take a step which any reasonable man would willingly submit to.

In the present case I have the finding of fact by the learned county court judge, who says: "All the medical witnesses called were of opinion that the applicant in his own interest ought to submit to the operation; the operation is of a simple character involving a risk which is hardly appreciable" to a man thirty years old and in good health. "The operation is one which any man of ordinary nerve would submit to in his own interest."

In these circumstances, without saying, of course, that a man can be compelled to undergo an operation, I do say that a continuance of his disability will be due not to the original accident, but to his unreasonable conduct in refusing to undergo this trivial operation. I think the county court judge himself took that view. He agreed, as I do, with great respect, with the decision of the majority of the Scotch judges in the case of *Donnelly* v. *William Baird & Co., Ld.* (1), but he thought himself bound, as he would be, by the decision of the Court of Appeal in this country in *Rothwell* v. *Davies* (2); but he had not the opportunity which we have had, from an inspection of the judges' notes, of seeing what was the real reason of the decision in that case. I desire respectfully to adopt the views of the majority of the Scotch judges in *Donnelly* v. *William Baird & Co., Ld.* (1), and particularly, if I may say so, the judgment of Lord M'Laren, which has not been read in Court, but which I have had an opportunity of reading. It seems to me that he puts the legal proposition in a very clear and unambiguous mode.

(1) 45 Sc. L. R. 394. (2) 19 Times L. R. 423.

If the parties desire it, the case must go back to the county court judge with an intimation that in our view he has a discretion and has consequently misdirected himself, and that it is open to him to say that the weekly allowance ought not to continue unless the defendant submits to this operation. It will be for him to say on the evidence what shall be done. If, however, Mr. Powell does not desire that, we could, but only by arrangement, make the order ourselves.

FLETCHER MOULTON L.J. I am of the same opinion. In my view a workman must behave reasonably, and if the incapacity, or the continuance of the incapacity after a certain time, is due to the fact that he has not behaved reasonably, then the continuing incapacity is not a consequence of the accident, but a consequence of his own unreasonableness. To hold the contrary would lead to this result: that a workman who had an injury, however small, might refuse to allow it to be dressed, and let a trivial wound become a sloughing sore, and lead to partial or total incapacity for which his employer must compensate him. That is not the meaning of the Act. You cannot draw a line, in my opinion, between dressing and operation—that would be an entirely unreal and fictitious distinction. The distinction is between being reasonable and not being reasonable; and I think that the case of *Rothwell* v. *Davies* (1), on account of the very imperfect report which it has received, has led to a misapprehension of the view of the Court of Appeal on this point. In *Rothwell* v. *Davies* (1) it now appears there was a finding that it was reasonable for the workman not to undergo the operation, and, therefore, the Court of Appeal held that the appeal could not be supported. Here, so far as the learned judge could possibly indicate his opinion, he has found that it is most unreasonable for the workman not to undergo the operation. In my opinion, if he finally holds so, when it goes back to him, or if we are allowed to decide it ourselves here, we must hold that any continued incapacity is due to the unreasonableness of the workman, and that he cannot continue to receive compensation.

(1) 19 Times L. R. 423.

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FARWELL L.J. I agree. In my opinion it was as much a question of fact for the county court judge whether the continuance of the incapacity was due to the accident or to some other cause as it was to decide whether the original incapacity was due to the injury. Lord M'Laren in *Donnelly* v. *William Baird & Co., Ld.*, has expressed my view exactly. He says (1): "There is, of course, no question of compelling the party to submit to an operation. The question is whether a party who declines to undergo what would be described by experts as a reasonable and safe operation is to be considered as a sufferer from the effect of an injury received in the course of his employment, or whether his suffering and consequent inability to work at his trade ought not to be attributed to his voluntary action in declining to avail himself of reasonable surgical treatment. In order to test the principle of decision I will suppose a more simple case. A workman whose trade requires the use of both hands—a watchmaker or an instrument maker for example—has the misfortune to break one of the bones of a finger, and from want of immediate assistance, or it may be from neglect, the bone does not unite in the proper way. The hand is disabled, but he is advised that by breaking the bone at the old fracture and resetting it the use of the hand will be completely restored. I am supposing a case where the operation is not attended with risk to health or unusual suffering, and where the recovery of the use of the hand is reasonably clear. If in such a case the sufferer, either from defect of moral courage, or because he is content with a disabled hand and is willing to live on the pittance which he is receiving under the Compensation Act, refuses to be operated on, I should have no difficulty in holding that his continued inability to work at his trade was the result of his refusal of remedial treatment, and that he was not entitled to further compensation."

That expresses my own view so entirely that I desire to adopt it.

Appeal allowed.

Solicitors: *Griffith & Gardiner; W. H. Curtis.*

(1) 45 Sc. L. R. 394, at p. 396.

W. C. D.

[IN THE COURT OF APPEAL.]

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RHODES *v.* SOOTHILL WOOD COLLIERY COMPANY, LIMITED.

Employer and Workman—Compensation—Agreement as to Amount of Compensation—Payment into Court—Infant Dependants—Approval of Registrar—Jurisdiction of County Court Judge—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *Second Schedule, par.* 9 (*d*)—*Workmen's Compensation Rules*, 1907, *r.* 56A, *par.* 4—*Workmen's Compensation Rules*, 1908, *r.* 4.

Where a claim for compensation under the Workmen's Compensation Act, 1906, is made by dependants, some of whom are infants, and the employer admits liability, and some one on behalf of the infant dependants enters into a conditional agreement with the employer as to the amount of compensation, the agreement has no validity until it has come before the registrar of the county court, whose duty it is to consider it on behalf of the infants; but if the money is sent to the registrar for payment into Court under par. 4 of r. 56A of the Workmen's Compensation Rules, 1907, upon a præcipe according to Form 53A, and the registrar signifies his approval by signing a receipt for the money, the agreement becomes binding for all purposes, and the employer is freed from all further liability, and the county court judge has no jurisdiction to require his appearance in any further proceedings, e.g., proceedings as to the apportionment of the money in Court.

An agreement as to the amount of compensation payable to dependants under the Workmen's Compensation Act, 1906, ought not to be signed by the dependants' solicitor on their behalf.

APPEAL from an award of the county court judge of Dewsbury sitting as arbitrator under the Workmen's Compensation Act, 1906.

On February 2, 1908, John Rhodes was killed by an accident arising out of and in the course of his employment by the respondents, and a claim for compensation against the respondents was made by Messrs. Samuel Brearley & Son, solicitors, on behalf of Rouel Rhodes (son), Sarah Jane Rhodes (daughter), and Mary Elizabeth Rhodes (daughter) as dependants. Of these claimants the last-named was an infant aged seventeen. The claim was referred by the respondents to the Yorkshire Coal Owners' Mutual Indemnity Company, Limited, and eventually the compensation was agreed at 65*l*. The agreement, which was dated

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March 11, 1908, was expressed to be made between the above-named solicitors for and on behalf of the dependants of the deceased man and the respondents, and it did not state who the dependants were. On March 19 the insurance company, on behalf of the respondents, sent a cheque for 65*l.* to the registrar of the county court in accordance with the provisions of the Workmen's Compensation Rules, 1907, with a præcipe containing a memorandum of the agreement and a request to the registrar to record it. The registrar raised the objection that an agreement for compensation ought not to be signed by a solicitor on behalf of the dependants and returned the cheque.

On May 1, 1908, the Workmen's Compensation Rules, 1908 (1), which were dated March 14, 1908, came into operation, and on May 12 the respondents' solicitors paid the 65*l.* into Court in accordance with par. 4 of r. 56A, which by r. 4 of the Rules of 1908 is substituted for r. 56 of the principal Rules.

The præcipe upon which the money was paid in was according to Form 53A, which follows the language of par. 4 of r. 56A and which by par. 5 of the said rule is the proper form to be used where money is paid into Court under par. 4. It contained a statement to the best of the knowledge and belief of the respondents of the names, ages, and addresses of the several dependants. On the following day, May 13, the registrar signed a receipt for the money. Messrs. Brearley & Son, the dependants' solicitors, then made an application to the county

(1) Rule 4 of the Workmen's Compensation Rules, 1908, so far as material, provides as follows:

"Rule 56 of the principal rules is hereby annulled and the following rule shall stand in lieu thereof:—56A [*Payment into Court, investment, and application of payment in case of death. Act, Sched. I. par.* 5.] Where any payment in the case of death shall be paid into the county court pursuant to paragraph 5 of the First Schedule to the Act the following provisions shall have effect.

"(4.) If there is no dispute as to the amount payable, but no valid agreement can be come to by reason of the disability or absence of the dependants or any of them, payment shall be made into the Court in which, if a valid agreement could be come to in the matter, such agreement would be recorded."

[Par. 5 provides that where money is paid into Court under par. 4 the employer shall lodge with the registrar a præcipe in duplicate according to the form 53A in the Appendix.]

court judge with respect to the apportionment of the sum in Court, but he declined to go into the question until the employers were represented. The solicitors accordingly filed a request for arbitration. In addition to the dependants above mentioned an illegitimate son of Sarah Jane Rhodes was added as an applicant, and the applicants claimed 156*l.* as compensation. The respondents set up the agreement as an answer to the claim and pleaded that by r. 5 of the Workmen's Compensation Rules, 1907, they were not necessary parties to the arbitration.

The learned county court judge, upon the construction of par. 4 of r. 56A, said that he read the words "no dispute" as meaning no question, and he thought that wherever an agreement so called had been come to it was an agreement which was not absolutely valid. In his opinion par. 4 did not apply. The memorandum of agreement originally submitted to the registrar was a memorandum of agreement between the employers on the one side and certain solicitors for and on behalf of the dependants on the other. The registrar demurred to record it because he said it was not an agreement so far as he could ascertain between any parties. Instead of tendering another agreement made between certain definite individuals and the employers, the employers preferred to take advantage of this new rule and take out a præcipe on which they paid into Court the sum which had been settled between them and the solicitors purporting to act on behalf of the dependants. They said there was no dispute, but in his opinion there was a dispute and a question, and the rule only applied where the employers were able definitely to shew that they were paying the largest possible sum payable under the Act, and therefore there could be no dispute as to the amount payable. There was no dispute as to the amount payable in cases where there was total dependency. In cases where there was partial dependency and the employers chose to pay the full maximum amount payable rather than be bothered with proceedings there would be no dispute as to the amount and the rule could be acted upon. In other cases he thought that the words "no dispute" must be satisfied by shewing that there was no question. In other words, where there were infants interested there was a question or

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dispute until the Court through the registrar or the judge had approved of the agreement for the benefit of the child. In the result he thought that in this case the employers were not protected under par. 4 and that the applicants were at liberty to proceed by way of request for an arbitration in order to get the amount ascertained conclusively and to take the opinion of the Court either through the registrar or the judge. He accordingly awarded 65*l.* to be paid as compensation and declared that the only persons entitled as dependants were the two daughters of the deceased man, and he apportioned the money between them; and he ordered the respondents to pay the costs of the arbitration.

The respondents appealed. The applicants did not appear upon the appeal.

R. A. Shepherd, for the appellants. Paragraph 9 (*d*) of the Second Schedule of the Workmen's Compensation Act, 1906 (1), contemplates an agreement as to the amount of compensation being made with persons under disability, and the joint effect of that provision and par. 4 of the substituted r. 56A is this: There may be, so to speak, what is known in the Chancery Division as a conditional agreement with infant dependants as to the amount of compensation, but in such a case the registrar

(1) Par. 9 of the Second Schedule of the Workmen's Compensation Act, 1906, provides:

"Where the amount of compensation under this Act has been ascertained . . . . by agreement, a memorandum thereof shall be sent, in manner prescribed by rules of Court, ... by any party interested to the registrar of the county court who shall, subject to such rules, on being satisfied as to its genuineness, record such memorandum in a special register without fee, and thereupon the memorandum shall for all purposes be enforceable as a county court judgment.

"Provided that—

"(*d*) Where it appears to the registrar of the county court, on any information which he considers sufficient, that . . . . an agreement as to the amount of compensation payable to a person under any disability, or to dependants, ought not to be registered by reason of the inadequacy of the . . . . amount, or by reason of the agreement having been obtained by fraud or undue influence, or other improper means, he may refuse to record the memorandum of the agreement sent to him for registration, and refer the matter to the judge who shall, in accordance with rules of court, make such order . . . . as he may think just;"

of the county court acts as the friend of the infant dependants and inquires into the adequacy of the amount, and the agreement does not become valid until the registrar has signified his approval by giving a receipt for the money. That is analogous to the sanction of a judge in chambers in the Chancery Division to an agreement on behalf of infants. After that the agreement is binding for all purposes, and the county court has no jurisdiction to call upon the employer upon any question of apportionment or as to the persons entitled as dependants. If on the other hand the registrar is not satisfied, the matter is referred to the county court judge, who may then require the appearance of the employer.

[COZENS-HARDY M.R. I observe that the agreement of March 11 was signed by the solicitors for the dependants. In my opinion that is improper, and I have known cases where that practice has resulted in a very grievous injustice being done to the dependants.]

There is no suggestion of any improper conduct on the part of the solicitors in the present case. The registrar having signed the receipt for the money, there was here no reason for making the appellants parties to these proceedings, and the costs of them ought not to have been given against them. The county court judge took the view that an employer could never take advantage of par. 4 of r. 56A unless he paid into Court the full maximum amount payable under the Act, but that is in effect to strike out the provision altogether.

COZENS-HARDY M.R. We are much indebted to Mr. Shepherd for his very clear argument. Having considered the terms of the Act and of the original rules and of the amended rules of March of this year, I feel no doubt that Mr. Shepherd's contention is well founded. The policy of the Act was this: that when the total amount of compensation has been agreed, and there are persons who can agree, the employer is not to be brought in to settle the quantum which is to be paid to any one member of the family who are dependants; that is left to be worked out amongst themselves. Then came the question what is to be done in the very common case of there being infants

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among the dependants. The Workmen's Compensation Act, 1906, contemplated, in language which I think is quite clear, that what might be called an agreement may be entered into by persons under age. Reading that Act together with the amended rules, I think what they contemplated was this: If there is a person under disability there can be no absolute agreement at all, but there may be that which is very familiar to anybody conversant with dealings in the Chancery Division on behalf of infants, namely, a so-called conditional agreement which is not really an agreement at all, because it is not operative unless and until it is sanctioned by the Court on behalf of the infants. The analogous provision in cases under the Workmen's Compensation Act is to this effect. When a sum is brought in by the employer, and somebody on behalf of the dependants says that he thinks that amount is fair and as far he can agrees to it, that does not become operative at all until the so-called agreement is brought before the registrar whose duty it is to consider it on behalf of the infants. If he is not satisfied he refers the matter to the judge, and the judge, if anything further has to be done, cannot deal with the matter ex parte, but must serve notice on the employer. But when once the conditional agreement, call it what you will, is brought before the registrar and he is satisfied, or does not express dissent and so must be taken to be satisfied, then, the only event in which it can be reviewed not having happened, it is binding in the same way and to the same extent as though there were a formal agreement actually entered into by persons themselves competent to agree. Although the language of par. 4 of the new rule 56A is not very apt, I think that is what it comes to. "If there is no dispute as to the amount payable but no valid agreement can be come to by reason of the disability or absence of the dependants or any of them payment shall be made into the Court in which if a valid agreement could be come to in the matter such agreement would be recorded." Of course it is difficult to say that there can be a dispute between parties who cannot agree. The language is not happy, but I think it means, if there is no dispute and no agreement which the parties themselves can enter into, but there is a conditional agreement which has been

approved by the registrar, then the money is to be paid into Court, and after that the employer is freed from responsibility. He ought not to be liable for the costs of appearing in a matter in which he has really no concern. In my view the order of the learned county court judge was wrong and the order for payment of costs must be discharged.

FLETCHER MOULTON L.J. I am entirely of the same opinion. It is greatly to the interest of the community that all parties engaged in disputes which arise out of accidents should be willing to act reasonably so far as their share of the matter is concerned, and that if they are willing to act reasonably and do all that can justly be required of them they should not be harassed by proceedings or be liable to costs. It seems to me that the Act and the Rules are alike framed with that intention. The person to whom this will most frequently apply is the employer. If the employer is willing to pay all that can fairly be demanded of him and makes that willingness known, I should expect that the Act and the Rules would furnish some way whereby he could do so and free himself from all further trouble in the matter—trouble arising from difficulties, we will say, as to the division of that compensation. Now, looking at the Rules, I am satisfied, after Mr. Shepherd's very clear argument, that what they mean is this: that where an agreement as to the amount to be paid is come to by those persons who are themselves capable of coming to an agreement and who, presumably, have at heart the interests of all who are dependants, such an agreement may be brought before the registrar, and he may sanction it and render it a valid and binding agreement. As the Master of the Rolls has said, it is not when brought before him properly termed an agreement because it is made on behalf of people who cannot make an agreement, but the Act and the Rules give the registrar the power of saying that he is satisfied that the amount of compensation is fair, and then the employer can under the new Rules free himself from all further proceedings and annoyance by paying it into Court. That was done in this case. The learned county court judge appears to me to have put a wrong interpretation upon the Rules. He seems

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to have taken the view that no agreement could be come to, where an infant was concerned, unless the very maximum sum which by any possibility could be awarded had been offered by the employer. I think that that is a strained, an unreal, interpretation of the language used. In this case the employers did exactly what was contemplated by the Rules and they were entitled to have the benefit of the Rules. Therefore I am of opinion that this appeal should be allowed.

FARWELL L.J. I am of the same opinion. I sympathize with the desire of the learned county court judge to protect the infants, and I think it most important that the necessity for their protection should be always borne in mind. I adopt everything that the Master of the Rolls said in the course of the argument on that head. But we are here dealing with a statute which provides compensation in certain events; and it is eminently desirable that that compensation should be ascertained finally and as speedily and with as little expense as possible. Sched. II., par. 9, of the Act of 1906 (reading only the appropriate words) provides that "where the amount of compensation has been ascertained by agreement a memorandum thereof shall be sent to the registrar who shall record such memorandum and thereupon the memorandum shall for all purposes be enforceable as a county court judgment." It is clear, therefore, that the judge in that case does not come in at all. Then it occurred to the Legislature that they had provided for dependants and for people who in many cases would be under disability. Therefore it was necessary that, inasmuch as an agreement properly so called could not be entered into by the infants or persons under disability, provision should be made for that event. Accordingly by clause (*d*) of par. 9 it is provided (reading it shortly) that "where it appears to the registrar of the county court on any information that he considers sufficient that an agreement as to the amount of compensation payable to a person under any legal disability or to dependants ought not to be registered by reason of the inadequacy of the amount" (or for certain other reasons therein mentioned) "he may refuse to record the memorandum of the agreement sent to him for registration and refer the matter to

the judge," and thereupon for the first time the judge's functions are called into play. It is therefore to my mind quite clear that the Legislature did intend to make the registrar occupy very much the position of a judge in chambers in Chancery and to look into the matter on behalf of the infants and to approve or not approve of the settlement come to. I cannot myself see that par. 4 of the substituted rule in any way takes away or alters that process of the registrar's final determination by recording the agreement. If the learned county court judge is right in holding that there never can be a dispute capable of settlement where there are infant dependants the effect is to strike out the rule altogether. The rule assumes there may be such a dispute, because it says "If there is no dispute as to the amount payable but no valid agreement can be come to by reason of the disability or absence of the dependants." Of course in a sense there can be neither question, dispute, nor agreement if there are infants; all that can be done is that a claim may be put forward on behalf of the infants, and in some way or other that has to be settled and the Act has provided the machinery by which it shall be settled by the registrar. If the registrar is satisfied, then the judge plays no part in the matter at all. I think with very great respect to the learned county court judge that he has been a little too careful of the infants' interests and has taken to himself jurisdiction in a case where he has no jurisdiction to interfere at all.

Appeal allowed.

Solicitors: *Vincent & Vincent, for Day & Yewdall, Leeds.*

H. B. H.

1908
Nov. 27.

[IN THE COURT OF CRIMINAL APPEAL.]

THE KING *v.* DUNLEAVEY.

Criminal Law—Appeal to Court of Criminal Appeal involving Questions of Fact—Right of Prisoner to be present—Waiver of Right by Counsel—Criminal Appeal Act, 1907 (7 *Edw.* 7, *c.* 23), *s.* 11, *sub-s.* 1.

Where an appeal to the Court of Criminal Appeal involves questions of fact and the prisoner desires to be present, the Court has no power under s. 11, sub-s. 1, of the Criminal Appeal Act, 1907, to hear the appeal in his absence.

APPEAL (by leave of Channell J. granted under s. 17 of the Criminal Appeal Act, 1907) of the prisoner Edward Dunleavey from his conviction and sentence. The appeal involved questions of fact. The prisoner was unable to be present owing to illness, but desired to attend the hearing of his appeal.

F. T. Bigham, for the prisoner. Sect. 11, sub-s. 1, of the Criminal Appeal Act, 1907 (1), appears to place a difficulty in the way of the appeal being heard in the absence of the prisoner who desires to be present, unless the Court think that the discretion of the prisoner as to whether he should be present passes to counsel. The presence of the prisoner would not aid the conduct of the appeal. The question is whether counsel can, on behalf of the prisoner, waive the right to be present.

The judgment of the COURT (Lord Alverstone C.J. and Phillimore and Walton JJ.) was delivered by

LORD ALVERSTONE C.J. The case must stand over. Sect. 11, sub-s. 1, of the Criminal Appeal Act is imperative; the prisoner

(1) Criminal Appeal Act, 1907, s. 11, sub-s. 1: "An appellant, notwithstanding that he is in custody, shall be entitled to be present, if he desires it, on the hearing of his appeal, except where the appeal is on some ground involving a question of law alone, but, in that case and on an application for leave to appeal and on any proceedings preliminary or incidental to an appeal, shall not be entitled to be present, except where rules of Court provide that he shall have the right to be present, or where the Court gives him leave to be present."

has a right to be present unless the ground of appeal is on law alone, and in the present case the appeal involves questions of fact.

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Solicitor for prisoner: *The Registrar of the Court of Criminal Appeal.*

J. E. A.

[IN THE COURT OF APPEAL.]

C. A.

1908

Dec. 4.

In re IDA SIMON.

Bankruptcy—Married Woman—Separate Trading—Separate Property—Receiving Order—Jurisdiction—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 5.

Sect. 1, sub-s. 5, of the Married Women's Property Act, 1882, imposes only one condition precedent to the jurisdiction of the Court to make a married woman a bankrupt, namely, that she shall be carrying on a trade separately from her husband. The existence of separate property at the date when the receiving order is applied for is not a condition precedent to the jurisdiction of the Court, although the absence of separate property is a matter to be considered by the Court in the exercise of its jurisdiction.

A trade belonging exclusively to a married woman but managed by her husband on her behalf is a trade carried on by the married woman separately from her husband within the meaning of the Married Women's Property Act, 1882.

In re Helsby, (1893) 1 Mans. 12, considered.

APPEAL against a receiving order made by one of the registrars in bankruptcy.

The debtor, who was the wife of Max Simon, carried on business as a pianoforte manufacturer under the style of the Wonder Pianoforte Manufacturing Company. The facts relating to the business were as follows:—

The business was started in 1893 with the wife's money, but she had never taken any part in it or exercised any control over it; it was entirely under the control and management of the husband. The banking account of the business was kept in the name of the Wonder Pianoforte Manufacturing Company, Mrs. Ida Simon proprietress, Mr. Max Simon

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manager. All cheques were drawn upon and payments made into that account by the husband. The wife had nothing to do with the account beyond signing certain forms when the account was opened to enable the husband to operate upon it. The husband did not account to the wife for the profits, but he made the necessary payments for their maintenance and support. In cross-examination before the registrar the debtor stated that the business was really hers but was managed for her by her husband; and this was corroborated by the husband.

On October 2, 1908, the debtor executed a deed of assignment of all her property, except the leasehold premises on which the trade was carried on, to a trustee for the benefit of her creditors. The deed contained a recital that the husband had at all times acted as manager of the business of the debtor and alone conducted, controlled, and carried on such business, but on behalf of and in the name of the debtor; and at the request of the creditors the husband also signed the deed, the creditors acknowledging that they had no claim against him in respect of their debts. The deed contained an ultimate trust of the surplus, if any, in favour of the debtor.

On October 7 a bankruptcy petition was presented against the debtor trading as the Wonder Pianoforte Manufacturing Company by a creditor of the business, and the petition alleged that the debtor was carrying on business separately and apart from her husband, having separate estate and assets.

The petition was opposed upon the ground that two conditions were necessary before a receiving order could be made against a married woman—(1.) that she should be trading separately from her husband and (2.) that at the date of the receiving order she should have separate property—and that in this case neither of those conditions had been fulfilled.

The learned registrar found as a fact that the debtor was carrying on business separately from her husband and held that the trust of the surplus in her favour was property of the debtor, even assuming that it was necessary to prove the existence of separate property at the date of the receiving order, and he made a receiving order against her.

The debtor appealed.

Hansell, for the debtor. The liability of a married woman to the bankruptcy laws depends upon s. 1, sub-s. 5, of the Married Women's Property Act, 1882. In order to make a married woman a bankrupt under that sub-section the petitioning creditor must prove two things—first, that she was carrying on a trade separately from her husband; secondly, the existence of separate property; and the material date at which the existence of separate property must be proved is not the date of the act of bankruptcy, but the date when the receiving order is applied for: *In re Helsby* (1); *In re a Debtor* (2), where a single woman married after bankruptcy proceedings had been taken against her and it was held that she could not be made a bankrupt. In the present case neither of the two conditions has been fulfilled. At the date when the receiving order was made the debtor had no separate property, because she had assigned it all for the benefit of her creditors. But for the doctrine of the relation back of the trustee's title, which can only arise on adjudication, the deed of assignment was perfectly good; it could not be avoided until adjudication. The whole liability of a married woman to pay her debts is not a personal liability, but a merely proprietary liability, and if there is no separate property the Bankruptcy Court has no jurisdiction to make a receiving order. The word "property" as used in the Married Women's Property Act, 1882, has a much narrower signification than the word as used in the Bankruptcy Acts—*In re Armstrong* (3)—and means property which if the married woman were a feme sole could have been taken in execution. The learned registrar was wrong in saying that the existence of the ultimate trust in the debtor's favour in the deed of assignment in itself constitutes property within the meaning of the Married Women's Property Act; it is a mere expectation. Further, the debtor was not carrying on a trade separately from her husband. It was her business, but it was carried on by the husband. The test of separate trading is who has the management and control: *In re Helsby*. (1)

Lewis Thomas, K.C., and *W. de B. Herbert*, for the petitioning creditor, were not called upon.

(1) 1 Mans. 12. (2) [1898] 2 Q. B. 576.
(3) (1886) 17 Q. B. D. 521, 528.

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COZENS-HARDY M.R. This is an appeal from Mr. Registrar Linklater, who has made a receiving order against a married woman. We have had an able and interesting argument from Mr. Hansell seeking to satisfy us that there was no jurisdiction to make the order. He takes two points, the second of which I will deal with first, as I think that that is the really substantial one. He says that this married woman was not carrying on a trade separately from her husband. That is an issue of fact depending on the evidence which has been adduced. That evidence consists partly of an affidavit by the husband and wife, partly of their cross-examination upon that affidavit, and partly of a deed of assignment executed by the married woman in favour of her creditors, and having regard to the evidence given both by the lady and by her husband it appears to me to be clear to demonstration that this was a case in which she was carrying on a trade separately from her husband within sub-s. 5 of s. 1 of the Married Women's Property Act, 1882. She has sworn that the business was really hers but it was managed by her husband; and the husband confirms that. The deed of assignment treated the business as hers, and her creditors say so in terms. When the business was started a banking account was opened in the artificial name of the firm, "Mrs. Ida Simon proprietress, Mr. Max Simon manager." She gave a revocable authority to the bank to honour her husband's cheques. In these circumstances it appears to me to be immaterial to say that the husband being in the position of manager did in fact manage the business and that the wife did not interfere. It was carried on by the husband as manager under a revocable authority from the wife. Carrying on a business separately from the husband does not mean that the business must be carried on without any interference by the husband. This was the wife's business carried on by the husband for her benefit.

But then it is said that the Court has no jurisdiction to make a receiving order against a married woman without proof not only that she was carrying on a trade separately, but also that she had separate property at the time when the receiving order came to be made. I am unable to assent to that view. As I read sub-s. 5 of s. 1 of the Married Women's Property Act,

1882, which for the first time, apart from local custom, made a married woman amenable to the bankruptcy jurisdiction, it simply provides one condition precedent which is necessary to give the Court jurisdiction, and that is that the married woman must be carrying on a trade separately from her husband. Given that one condition she is subject to the bankruptcy laws as if she were a feme sole, although being so subject she can only be made subject in respect of her separate property. I cannot hold that in order to give the Court jurisdiction there is any necessity for proving the existence of separate property at the time when the receiving order is made, although the existence of separate property at that time and the probability of that property being reached are matters which the Bankruptcy Court in the exercise of its jurisdiction will have to consider. Therefore I think that on that simple ground, on the construction of the subsection itself, there was ample jurisdiction to make the order made by Mr. Registrar Linklater. But if it is necessary to go further I feel no shadow of doubt that the interest which this lady had in the ultimate surplus under the trusts of this deed of assignment was separate property which she had at the date of the deed, and which, assuming the surplus to amount to anything, might have been got at by means of equitable execution. But then it is said that that is inconsistent with the decision of this Court in *In re a Debtor*. (1) In that case a single woman committed an act of bankruptcy and bankruptcy proceedings were taken against her. The proceedings were perfectly regular, but when the petition came on for hearing she obtained an adjournment, and before the petition came on again she married and said that, being a married woman not carrying on a trade separately from her husband, she was not subject to the bankruptcy laws. All that the Court of Appeal decided was that the status of a married woman, not by reason of the Bankruptcy Act itself, but by reason of old and undisputed principles of bankruptcy law, was a sufficient answer to the petition except in the one case provided by the Married Women's Property Act, 1882, and it was admitted that that condition had not been fulfilled. I do not myself see that that case has any bearing on the question

(1) [1898] 2 Q. B. 576.

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before us. The true view is, given the carrying on of a separate trade, the status of a married woman is no protection at all against her liability to bankruptcy proceedings; but there is this difference, that the bankruptcy proceedings can only operate on that which is her separate property as understood by the decisions of the Court, and will not apply to some things which in the case of a man would be deemed to be property, as for example a general power of appointment. For these reasons, which are substantially those given by the learned registrar, notwithstanding Mr. Hansell's able argument, I think that this appeal fails and must be dismissed with costs.

FLETCHER MOULTON L.J. I am of the same opinion. As regards the question of fact there is overwhelming evidence that this business was the sole property of the wife, although she carried it on by the aid of her husband as manager. With regard to the other point I think that the case is also clear. There was an old exception of married women from the provisions of the Bankruptcy Acts with certain local exceptions to which the Master of the Rolls has referred, but the Married Women's Property Act, 1882, made a most important and most just alteration in the law. Sub-s. 5 of s. 1 provides that "every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a feme sole." I have no hesitation in saying that the liability of a married woman to the Bankruptcy Act under that sub-section depends on only one condition precedent, i.e., that she shall be carrying on a trade separately from her husband. If that condition is satisfied she is liable to the Bankruptcy Act. Now let me take a case where she has no separate property. The provisions of the Bankruptcy Act only affect her separate property. There is therefore no separate property which can be affected, and (just as in the case of a man who has no property but whose creditors desire to make him a bankrupt) the Court may in the exercise of its discretion say that an adjudication will be a useless form of proceeding and therefore will not make the woman a bankrupt. But this is not because the Court

has not jurisdiction to make the woman a bankrupt under such circumstances, but because it thinks that it would be an idle form of no benefit to the community, and therefore it will in its discretion abstain from availing itself of its jurisdiction.

This case appears to me to be well within the operation of sub-s. 5 of s. 1 of the Married Women's Property Act. Here is a woman undoubtedly carrying on a trade separately from her husband, the trade being her property. She therefore comes under the provisions of the Bankruptcy Act. It is said that she has no separate property because she has signed a deed assigning it all to her creditors, but I ask myself, if this was the case of a man should I in the exercise of my discretion refuse to put in force the provisions of the Bankruptcy Act? Most certainly I should not so refuse. There was a preceding act of bankruptcy in calling the creditors together which would upon bankruptcy supervening nullify this assignment, and, moreover, certain property was excepted from the deed of assignment. Therefore there is property which by the provisions of the Bankruptcy Act would be available for distribution amongst the creditors. As, therefore, the Bankruptcy Act applies and there is nothing to induce the Court to stay its hand on the ground of discretion, in my opinion this woman ought to be made a bankrupt. Reliance is placed by the appellant on two cases. The first, *In re a Debtor* (1), is an admirable case for illustrating the condition precedent to the Bankruptcy Act applying at all. There a woman married after proceedings in bankruptcy had been taken against her but before a receiving order was made, and, as she was not carrying on a trade separately from her husband, the consequence was that the Bankruptcy Act did not apply at all and that the proceedings terminated ex necessitate rei. The other case, on which much stress was laid, is *In re Helsby.* (2) I confess that I do not understand the decision in that case, but I am satisfied that if the case decides what the head-note states it cannot be supported. The head-note says, "A married woman cannot be made a bankrupt in respect of a business carried on by her if such business is even partially under the control of her husband." Now "under the control"

(1) [1898] 2 Q. B. 576. (2) 1 Mans. 12.

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may mean that he is manager and has no proprietary interest in the business at all. If that be the meaning the statement is certainly not good law. Then the head-note goes on, "It is not sufficient that her interest in the business is her separate property." If a married woman has a business of which she is sole proprietress, that is her separate property in every sense of the term and she can be made bankrupt in respect of it. I doubt myself whether the judgments of the learned judges warrant that head-note, but I am not satisfied that they sufficiently distinguished between the condition precedent to the Bankruptcy Act applying at all to a married woman and the extent to which the Act applies where it does apply. Therefore without going further into that decision I am content to say that if and so far as it differs from our decision in the present case it is not binding upon us, and to that extent must be considered as having no further authority.

FARWELL L.J. I agree. Upon the question of fact I have really nothing to add. *In re Helsby* (1) was a decision only on fact and we are not reconsidering the finding of fact in that case; but so far as it lays down any principle inconsistent with our present decision I agree that it must be treated as overruled. On the other point I confess I was somewhat startled at the proposition put forward by Mr. Hansell, namely, that when an act of bankruptcy had been committed by a married woman she could avoid the consequences of that act by at once denuding herself of all her property. That seems to me to be a wholly untenable proposition. Turning to the Married Women's Property Act, the only condition precedent is that the married woman shall be carrying on a trade separately from her husband. That fact having been proved, the Act provides that the same considerations are to apply as if she were a feme sole. I ask myself would there be any answer to the bankruptcy proceedings if the appellant were a feme sole? In my opinion there clearly would not. It is said that she has no property now by reason of this act of hers. In the first place that act was simply a nullity as against her trustee in bankruptcy, but in the second place the

(1) 1 Mans. 12.

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Farwell L.J.

actual existence of separate property is not a condition precedent and therefore essential to the power of the Court to apply the Bankruptcy Act. No doubt, as a general rule, it would be undesirable to allow the expense of bankruptcy proceedings to be incurred if nothing were to come of it, but I remember that Vaughan Williams J., in dealing with the analogous case of the winding up of a company, once said: "True, this company may not have any assets, but it is a wreck in the fairway of commerce and the sooner it is cleared away the better." That may be applied to the case of a married woman who is carrying on a business without any means. To my mind the absence of all cash is not in itself a conclusive reason why a married woman should not be made a bankrupt.

Appeal dismissed.

Solicitors: *Coburn & Co.; Syrett & Sons.*

H. B. H.

WRIGHT AND ANOTHER *v.* ANDERTON.

1908

Dec. 7, 8.

Innkeeper—Traveller—Cost of Accommodation defrayed by another Person——Loss of Property—Guest—Customary Liability of Innkeeper.

Where a traveller is provided with accommodation and refreshment in an inn, the fact that the expenses thereof are by agreement between the innkeeper and another person to be paid for by that other person does not prevent the relation of innkeeper and guest from arising, and the innkeeper, therefore, incurs the customary liability for the safe custody of the traveller's goods in the inn.

APPEAL from the Bradford County Court.

The plaintiffs were two members of the Sandal hockey team, and on January 18, 1908, they went with the rest of the team to Bradford to play in a match against the Bradford Hockey Club. The defendant kept the White Hart Inn at Bradford, and by an arrangement made with the captain of the Bradford club the defendant reserved a room in his inn for two hours on Saturday afternoons during the hockey season for the use of the members of the Bradford hockey team and of visiting

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teams at a charge of 2*s.* 6*d.* a week; it had also been arranged that on these occasions the defendant would supply tea at his inn to the Bradford team and their opponents. The charge for the tea, as well as for the room, was paid by the Bradford club. On January 18 the plaintiffs and the other members of the two teams, before playing, changed their clothes in the room in question. They were absent from the room for about an hour and a half, and on their return after the match it was found that during their absence a thief had entered the room and had stolen watches, money, and jewellery, belonging to the plaintiffs and other members of the teams, from the pockets of the clothes which they had left in the room. After changing again, the plaintiffs with the others, in accordance with the arrangement above mentioned, were served with tea in another room in the inn. None of the stolen property had been recovered, and the plaintiffs claimed from the defendant in this action the amount of their loss.

The county court judge in giving judgment said: "Two main questions arise. First, were the plaintiffs guests of the inn, or had the Bradford Hockey Club rented the room so as in law to take it out of the control of the defendant and prevent his being responsible for the goods left in it? I am of opinion that the room was being used at the time as part of the inn. It is an ordinary use of an inn to change your clothes and obtain refreshment in it, and those who use an inn for these purposes are, I think, prima facie guests. I am therefore of opinion that if the separate members of the team had each paid for the use of the room and his tea, they would all of them have been guests. The second and more difficult question is whether the fact that the payment for the room and for all the tea was made by the Bradford club affects the liability of the defendant for the goods brought into the room by the members of the two teams in respect of which the payments were made. It was contended that as there was no contract between the plaintiffs and the defendant he had no lien on, and incurred no responsibility for, their goods. It was, however, decided as long ago as the case of *Beedle* v. *Morris* (1) that the owner of goods which his servant

(1) (1609) Cro. Jac. 224.

has taken into an hotel can sue for their value if they are lost although he was not a guest, if his servant was. Yet in that case there can be no contract between the plaintiff and the innkeeper. The same point has been decided in America: see *Dickinson* v. *Winchester* (1) and *Mason* v. *Thompson*. (2) It may be said, however, that the Bradford Hockey Club was not the servant or agent of the plaintiffs, but in the case of *Gordon* v. *Silber* (3) Lopes L.J. held that where a man and his wife went as guests to an hotel, though the contract was made solely with the husband, and such payments as had been made had been made by him, the innkeeper had a lien upon the jewellery and other personal property of the wife for the whole amount of the bill that was unpaid, and the learned judge expressly stated that the responsibility of the innkeeper would be co-extensive with his right of lien. That decision did not turn at all upon the law of husband and wife, and in the work of Jelf and Hurst on the Law of Innkeepers it is treated as a decision that when a party of guests goes to an hotel and one of them contracts and pays for the whole number, the hotelkeeper is still liable for the goods that all of them bring in and has a lien upon the whole of such goods for his whole account. I think that case governs the present one, and that, though the accommodation supplied by the defendant to the members of both teams was paid for by the Bradford club, the members were none the less guests, and, as such, were entitled to rely on the customary liability of the innkeeper for the loss of their goods, and all their goods were the subject of the innkeeper's lien for the expenses of that day's entertainment. I am of opinion that the defendant is liable for the goods and money that were lost and I give judgment for the plaintiffs."

The defendant appealed.

R. Watson, for the defendant. First, during the time that the room was in the occupation of the members of the Bradford Hockey Club it ceased to be a part of the inn, and the defendant was, therefore, not responsible for the safe custody of the goods

(1) (1849) 58 Mass. 114. (2) (1830) 26 Mass. 280.
(3) (1890) 25 Q. B. D. 491.

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left in it. An innkeeper is only bound to find convenient lodging rooms for his guests: *Burgess* v. *Clements* (1); and the legal inference to be drawn from the facts found by the county court judge is that there was a hiring of the room for a purpose not within the ordinary user of an inn, and one which involved the introduction into the inn of a number of persons who would be strangers to the landlord, and over whom he consequently could have no check or control. This latter consideration was one which weighed with Lord Ellenborough C.J. in *Burgess* v. *Clements*. (2) Secondly, the relation of innkeeper and guest never arose between the defendant and the plaintiffs. They were not the guests of the defendant, but of the Bradford club, which paid for the accommodation and refreshment provided. The county court judge based his decision on *Gordon* v. *Silber* (3), but that case is distinguishable from the present, for there the defendant's wife was clearly a guest of the hotel in every sense of the word; here, on the contrary, there was a definite contract by the defendant with the captain of the Bradford club to supply refreshment at the club's expense to any one brought to the inn by the members of the club. The obligation of an innkeeper to keep a guest's goods safely is co-extensive with the innkeeper's lien upon the guest's goods for the expenses of his lodging and food, and in *Gordon* v. *Silber* (3) Lopes L.J. held that the innkeeper had a lien on the wife's goods for charges incurred by the husband alone, but it cannot be the law that in the circumstances of the present case the defendant would have had a lien on the plaintiffs' property for the expenses incurred by the Bradford club. This shews that *Gordon* v. *Silber* (3) cannot be decisive of this case. [He also referred to *Lamond* v. *Richard* (4) and *Orchard* v. *Bush*. (5)]

F. Y. Stanger, for the plaintiffs, was only called on to argue the second point. The relationship of innkeeper and guest exists whenever a person enters an inn for the purpose of receiving such hospitality as it is the business of an innkeeper to supply. The question who is to pay for that hospitality is immaterial.

(1) (1815) 4 M. & S. 306.
(2) 4 M. & S. at p. 311.
(3) 25 Q. B. D. 491.
(4) [1897] 1 Q. B. 541.
(5) [1898] 2 Q. B. 284.

A person who would otherwise be a guest in an inn does not cease to be so because some other person has undertaken to pay his bill.

Watson, in reply, referred to *Robins* v. *Gray*. (1)

Cur. adv. vult.

Dec. 8. BIGHAM, J. I think that this appeal must be dismissed. Two points have been taken on behalf of the defendant, the first one being that the room in which the plaintiffs left their property was in the circumstances not a part of the inn. That question appears to me to be more a question of fact than of law, but if it be a mere question of the legal inference to be drawn from the facts stated in the judgment, I think that the county court judge has drawn the right inference, and I need say no more on that point, for I entirely agree with his decision and with his reasons.

The next point is that the relationship of innkeeper and guest had not arisen between the defendant and the plaintiffs so as to make the common law applicable to this case. I do not agree with that contention, and I will state what I conceive the law to be on this point. The responsibility of an innkeeper for the safety of a traveller's property begins at the moment when the relation of guest and host arises, and that relation arises as soon as the traveller enters the inn with the intention of using it as an inn, and is so received by the host. It does not matter that no food or lodging has been supplied or found up to the time of the loss. It is sufficient if the circumstances shew an intention on the one hand to provide and on the other hand to accept such accommodation. The goods of the traveller then become liable to a lien, though the lien does not attach until a debt is incurred. Nor does it matter who is to pay; it may be the traveller himself or it may be some other person who pays for him. If the circumstances which I have mentioned are found to exist, the common law liability of an innkeeper for the safety of the goods of his guest arises. Those circumstances did, in my opinion, exist in the present case. The plaintiffs entered the defendant's inn

(1) [1895] 2 Q. B. 501.

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intending to use it as an inn; they were allowed by the defendant to so enter—in fact, in the absence of any lawful objection, the defendant was bound to admit them. They went there with the intention of using the accommodation provided by the defendant for changing their clothes and in order to be supplied with refreshment. The moment that state of things existed the defendant became responsible for the safe custody of the plaintiffs' property deposited by them in the inn. It is true that the plaintiffs were not the persons who were going to pay for the accommodation and refreshment provided for them. As I have said before, that makes no difference, as the defendant was going to be paid, although not by the plaintiffs.

For these reasons I am of opinion that this appeal must be dismissed.

WALTON J. I agree.

Appeal dismissed.

Solicitors for plaintiffs: *Crossman, Prichard & Co., for Langhorne and Barnes, Wakefield.*

Solicitors for defendant: *Steadman, Van Praagh & Gaylor, for Neumann & Holmes, Bradford.*

F. O. R.

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Nov. 3.

Parliament—Occupation Franchise—Objection—Prima facie Proof of Ground of Objection — Evidence admissible before Revising Barrister — Houses similarly occupied—Parliamentary and Municipal Registration Act, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-s.* 10.

At a Court held by a revising barrister objection was taken to the names of certain persons being retained in division 1 of the occupiers' list for a borough on the ground in each case that they had not occupied as owner or tenant the premises named in the list for twelve months immediately preceding July 15 in the year. The objector proved as to each of the persons objected to—(1.) that the dwelling-house in respect of which he claimed to be placed on the list formed part of a house which was itself a house of the description known as an ordinary dwelling-house; (2.) that the landlord or landlady to whom he paid rent also resided in the house; and (3.) that the landlord or landlady was rated and paid the rates for the whole house as a separate tenement. The revising barrister then examined the assistant overseer and the registration clerk for the borough as to the conditions of letting, in the majority of cases in the borough, of houses of the same description as those occupied by the persons objected to:—

Held, that the revising barrister, if he believed that the proof of the three facts above stated applied to the particular house and occupation as to which the objection was taken, ought then to have inquired into the circumstances of the occupation in that particular case; he must not, as he had done in the present case, act upon general evidence with regard to the majority of houses similarly occupied in the borough, and he must therefore be directed to complete the revision.

It is always for the revising barrister to judge whether the evidence brought before him on behalf of the objector (which may not be strictly legal evidence) is prima facie proof or not of the ground of objection.

Case stated by the revising barrister for the parliamentary borough of Devonport.

1. At a Court holden on September 16, 1908, before the revising barrister, the appellant George James Kent appeared and duly objected to the names of certain persons being retained on division 1 of the respective occupiers' lists for the borough on the ground, in each case, "That you have not occupied as owner or tenant the premises named in the said list for twelve months immediately preceding July 15 in this year."

2. The objector proved as to each of the persons—

(1.) That the dwelling-house in respect of which he claimed to

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be placed on the list formed part of a house which was itself a house of the description known as an ordinary dwelling-house;

(2.) That the landlord or landlady to whom such person paid rent also resided in the house; and

(3.) That the landlord or landlady was rated and paid the rates for the whole house as a separate tenement.

3. The objector submitted that on proof of the three facts mentioned in paragraph 2 the revising barrister was bound, as a matter of law, to hold that he had given prima facie proof of his ground of objection within the meaning of s. 28, sub-s. 10, of the Parliamentary and Municipal Registration Act, 1878. (1)

4. The revising barrister thereupon examined on oath the assistant overseer and the registration clerk for the borough, and he found as facts that, in the cases where houses of the description referred to in paragraph 2 were occupied by others in addition to the landlord, the conditions of letting, in the great

(1) Parliamentary and Municipal Registration Act, 1878, s. 5: "In and for the purposes of the Representation of the People Act, 1867, the term 'dwelling-house' shall include any part of a house where that part is separately occupied as a dwelling, and the term 'lodgings' shall include any apartments or place of residence, whether furnished or unfurnished, in a dwelling-house."

Sect. 28, sub-s. 9: "Subject as herein and otherwise by law provided, the revising barrister shall retain the name of every person not objected to, and also of every person objected to, unless the objector appears by himself or by some person on his behalf in support of his objection."

Sub-s. 10: "If the objector so appears the revising barrister shall require him, unless he is an overseer, to prove that he gave the notice or notices of objection required by law to be given by him, and to give prima facie proof of the ground of objection, and for that purpose may himself examine and allow the objector to examine the overseers or any other person on oath touching the alleged ground of objection, and unless such proof is given to his satisfaction shall, subject as herein and otherwise by law provided, retain the name of the person objected to. An objection made under this Act by overseers shall be deemed to cast upon the person objected to the burden of proving his right to be on the list.

"The prima facie proof shall be deemed to be given by the objector if it is shewn to the satisfaction of the revising barrister by evidence, repute, or otherwise that there is reasonable ground for believing that the objection is well founded, and that by reason of the person objected to not being present for examination, or for some other reason, the objector is prevented from discovering or proving the truth respecting the entry objected to."

majority of cases due to the scarcity and consequent high rentals of separate houses suitable for the working classes, were during the qualifying period as follows :—

The person (hereinafter called the occupant) taking the part (hereinafter called the dwelling) occupied one or more unfurnished rooms, to which he had at all hours free access both from the street by means of a latchkey when the door was locked, and also from the interior of the house, and the landlord reserved to himself no right to fasten the door so as to prevent such free access; he had the sole and exclusive occupation of the dwelling; no services whatever were rendered to him by the landlord in the dwelling; the landlord had not by agreement, nor did he claim, the right to, nor in fact did he, enter the dwelling at any time or exercise any act of control over it, and the landlord's residence in the house was under identically the same conditions as that of the occupant or occupants.

5. The objector did not establish or seek to establish any facts contrary to the facts found in paragraph 4.

6. The revising barrister then held that he was not bound, as a matter of law, on proof of the three facts set out in paragraph 2, to hold that the objector had given prima facie proof to his satisfaction of the ground of objection set out in paragraph 1.

7. Upon the facts set out in paragraphs 2 and 4 hereof he held that it had not been shewn to his satisfaction that the objector had given prima facie proof of the ground of objection, and he therefore retained the names of the persons on the lists.

8. As it appeared to the revising barrister that the several appeals depended upon his decision, he ordered the appeals in all the cases to be consolidated.

9. If the Court was of opinion that his decision was wrong in point of law the Court was to direct the revising barrister to complete the revision.

Foote, K.C., and *Daldy*, for the appellant. The revising barrister had no power to obtain facts rebutting the prima facie proof of the ground of objection. He was bound to say, on proof of the three facts mentioned in paragraph 2 of the case, whether prima facie proof of the ground of objection had been given.

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All the rebutting evidence which he obtained from the assistant overseer was secondary evidence. The definition of "dwelling-house" is contained in s. 5 of the Parliamentary and Municipal Registration Act, 1878. That does not seem to contemplate the possibility of a dwelling-house being part of a dwelling-house. Here the evidence is that both are dwelling-houses. The power contained in s. 28, sub-s. 10, of the Act of 1878 to give prima facie proof by evidence, repute, or otherwise is in aid of the objector. If he cannot give legal proof of the ground of objection, something less will do, but only where the objector fails to give legal prima facie proof; and the revising barrister has no power to cross-examine a witness with a view to rebutting the prima facie proof of the ground of objection. In the present case there was prima facie proof of the ground of objection before the examination of the assistant overseer by the revising barrister, for *Kent* v. *Fittall* (1) shews that immediately the three facts mentioned in paragraph 2 of the case were proved there was prima facie proof of the ground of objection. All the evidence given by the assistant overseer was evidence of repute which was inadmissible: *Kent* v. *Fittall* (No. 2). (2) It was necessarily merely evidence of repute, inasmuch as it was not directed to any particular case. Immediately the three facts stated in paragraph 2 of the case were proved, it was for the person objected to to prove his right to have his name inserted in the list: *Douglas* v. *Smith.* (3) The fact that the landlord lived in the house was a vital element in considering whether the persons objected to were occupiers: *Hogan* v. *Sterrett* (4); *Bradley* v. *Baylis.* (5) The decision in *Campbell* v. *Chambers* (6) shews that proof of the three facts mentioned in paragraph 2 of the case is prima facie proof of the ground of objection. A person who lets part of the house in which he lives retains the right of control unless he gives it up. It is inconceivable that in the great majority of cases the landlord resides in the house merely for his own convenience. It must be because he is the owner of the house and desires to retain the control of it. No

(1) [1906] 1 K. B. 60.
(2) [1908] 2 K. B. 933.
(3) [1907] 1 K. B. 126.
(4) (1886) 20 L. R. Ir. 344.
(5) (1881) 8 Q. B. D. 195.
(6) (1886) 20 L. R. Ir. 355.

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evidence was given with regard to the particular dwelling-house in respect of which the vote was claimed, and the evidence given by the assistant overseer was therefore irrelevant.

Danckwerts, K.C., and *Ricketts*, for the respondent. Strict legal evidence is not necessary before the revising barrister either on the part of the objector or the person objected to: *Kent* v. *Fittall* (No. 2). (1) The three facts stated in paragraph 2 of the case are not facts from which the revising barrister is bound to conclude that there is prima facie proof of the ground of objection. It is clear from paragraph 4 of the case that the prima facie proof was not established. Under s. 41 of the Parliamentary Registration Act, 1843 (6 & 7 Vict. c. 18), it is the duty of the revising barrister to proceed in the same manner with regard to taking evidence as a returning officer did previous to the passing of the Representation of the People Act, 1832 (2 & 3 Will. 4, c. 45). The returning officers were never bound by strict legal rules of evidence. They sat near the polling place and had to decide an objection (with an assessor) summarily, and could not have received strict evidence. Sect. 65 of the Parliamentary Registration Act, 1843, shews that no appeal lies from a revising barrister on any question of fact or upon the admissibility of any evidence. That the existence of the three facts stated in paragraph 2 of the case is consistent with the person objected to being an occupier or a lodger is shewn by the decisions in *Douglas* v. *Smith* (2), in which the objection was upheld, and in *Kent* v. *Fittall* (3), in which it was overruled. It is for the revising barrister to say whether the three facts constitute in his judgment prima facie proof of the ground of objection. The judgments in *Douglas* v. *Smith* (2) shew that he is not bound as a matter of law to draw the inference that they do constitute prima facie proof. It is not a necessary inference, but merely one which may be drawn. The evidence given by the assistant overseer was rightly admitted. The inference which ought to be drawn from particular facts depends on the customs and habits of the particular locality where the facts exist. For example, different inferences might be drawn from a

(1) [1908] 2 K. B. 933. (2) [1907] 1 K. B. 126.
(3) [1906] 1 K. B. 60.

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given state of facts existing in England and Turkey. The customs of the particular place the revising barrister was dealing with were therefore material and were rightly inquired into by him, and the evidence given by the assistant overseer to the effect that it is not the custom for landlords in Devonport to control dwelling-houses of which they let a portion was admissible. The evidence of the assistant overseer was taken by the revising barrister in order to test the value of the evidence of the three facts stated in paragraph 2 of the case. The usage of the inhabitants of a town is cogent evidence, and the revising barrister was entitled to obtain information upon the point. He had power to take the evidence under s. 28, sub-s. 10, of the Parliamentary and Municipal Registration Act, 1878. Even though no further evidence had been given than the proof of the three facts stated in paragraph 2 of the case, the revising barrister would have been entitled to say he was not satisfied that the objector had given prima facie proof of the ground of objection, and he was not the less entitled to say so after he had ascertained the usage of Devonport landlords. [*Burgess* v. *Morton* (1) was also referred to.]

Foote, K.C., in reply. The meaning of the expression "prima facie proof" is that the revising barrister is to look at the evidence which constitutes prima facie proof and nothing more. It was his duty under s. 28, sub-s. 10, of the Parliamentary and Municipal Registration Act, 1878, to rule whether prima facie proof had been given when the three facts stated in paragraph 2 of the case were proved.

LORD ALVERSTONE C.J. I am of opinion that we must direct the revising barrister to complete the revision.

Much argument has been addressed to us as to the true meaning of s. 28, sub-s. 10, of the Parliamentary and Municipal Registration Act, 1878. I do not desire to say anything with regard to that sub-section beyond that which I have said on previous occasions. It is established by a long series of decisions that a revising barrister may act on evidence which would not be strictly legal evidence, and may inform his

(1) [1896] A. C. 136.

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mind in ways which are not open to tribunals where strict rules of evidence apply. I am glad to know that—so far as one can judge—the Court of Appeal thinks that the same rule with regard to the rights of revising barristers acting on other than legal evidence applies both to a case presented on behalf of the person who claims the vote and on behalf of the person who objects to the vote. The point, however, does not arise before us, and I only mention it because after the argument we have heard the decision in *Kent* v. *Fittall* (No. 2) (1) does not appear to go so far as some persons have thought it did.

Further, I have no doubt that the revising barrister is entitled to put questions to any witnesses who may come before him in order to establish or give proof of the objection which is taken before him. It seems to me that that is in express terms provided for by the language of the first paragraph of s. 28, sub-s. 10, of the Parliamentary and Municipal Registration Act, 1878.

I am also of opinion that this Court could not inquire into the sufficiency of proof before the revising barrister where he has found that certain facts are established to his satisfaction by the evidence before him. In the present case that which occurred shews, in my opinion, not only that the revising barrister put questions—not only that he examined—as to the proof that was given him, but that, as the result of the answers to the questions which he put, he acted upon that which he ought not properly to have taken into consideration. If all that we knew was that the revising barrister, having had the evidence, or that attempted proof set out in paragraph 2 of the case before him, had come to the conclusion that he was not satisfied as to the proof, I am not sure that we could inquire into the matter further. But I think it right to say that after a very careful study of the authorities I am not aware of any case in which it has been suggested that, assuming that those three facts are proved by the objector, and nothing more, the revising barrister is bound to retain the name objected to on the list of voters. It seems to me that it is quite possible that a case might arise where the revising barrister may state as a matter of fact that

(1) [1908] 2 K. B. 938.

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on the attempted proof of those three facts alone he was not satisfied. But, assuming that those facts are proved, as I understand the revising barrister to state that they were in the present case, I am not aware of any authority which suggests that the revising barrister is bound to allow the vote to remain.

In *Kent* v. *Fittall* (1) it was decided that, where on evidence before him the revising barrister was satisfied that the landlord had no control over that part of the house in respect of which the franchise was claimed, the vote would then be retained, and that in cases governed by that state of facts all the names must remain on the list. In *Douglas* v. *Smith* (2) it was decided that, those facts being proved, and it being attempted by answers to written questions to shew that the landlord had no control, the revising barrister was not bound to act on the written representation so made to him, but was entitled to strike off the votes. In *Kent* v. *Fittall* (No. 2) (3) the decision of this Court and the Court of Appeal in *Douglas* v. *Smith* (2) was approved of and adopted. If in the present case the revising barrister did not appear to me to have acted upon answers with regard to matters which were irrelevant and did not affect the question raised on the particular vote which was being objected to, I could not have interfered. But before I consider why in my judgment he has acted upon what was not matter which could properly be taken into consideration, I wish to make an observation upon the question as to the effect of the presence or absence of the landlord in the house. In my opinion there is no doubt about the law. In *Kent* v. *Fittall* (1) it was said in the Court of Appeal that the law was correctly stated in the judgments in this Court; and I desire to point out that Romer L.J. in giving judgment adopted the language of Sir George Jessel M.R. in *Bradley* v. *Baylis*. (4) Sir George Jessel M.R. said: "I have been quite unable, so far as I am concerned, to frame an exhaustive definition. Some judges have tried to do so, and, in my opinion, they have failed; and I think it wiser and safer to say that the question whether a man is a lodger or whether he is an occupying tenant must depend on the

(1) [1906] 1 K. B. 60.
(2) [1907] 1 K. B. 126.
(3) [1908] 2 K. B. 933.
(4) 8 Q. B. D. 195.

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circumstances of each case." It is now well established that the presence of the landlord who is living upon the house is not conclusive; and the judgment of Collins M.R. in *Kent* v. *Fittall* (1) shews, in my opinion, that while it is not conclusive it is a fact from which, under ordinary circumstances, the revising barrister would be entitled to draw a presumption of fact and not a presumption of law. Collins M.R. said: "It is not disputed that in dealing with the occupation of part of a dwelling-house, if the landlord is living in the house, that fact creates a presumption that the occupation of the other part is that of a lodger rather than that of an inhabitant occupier. But while that is the inference that may be drawn, it is not a necessary inference of law, and there is no authority that it is to be treated as conclusive." He then quotes with approval the judgment of Cotton L.J. in *Bradley* v. *Baylis*. (2) The judgments in *Kent* v. *Fittall* (1), *Douglas* v. *Smith* (3), and in many other cases seem to me to shew that the circumstances of the particular case have to be inquired into.

Now what are the circumstances of this particular case? They are that a person who claims as an occupier is objected to, and the question that has to be decided is whether or not he is occupying the part of the house, or the tenement, as a lodger or as an occupier. I cannot help thinking that a great deal of the difficulty in the present case arises from the fact that an attempt has been made—perfectly fairly, no doubt—to apply in Devonport different rules to those which are applied in other towns and districts in England. In my judgment, when we consider what the revising barrister states as being that upon which he acted, it is reasonably plain that he has not considered the circumstances of the particular house only, but he has considered the circumstances of a class of houses within which the particular vote under consideration might or might not fall. Paragraph 4 of the case commences with the statement "I thereupon examined on oath the assistant overseer and the registration clerk for the said borough." The revising barrister does not suggest he had any doubt of the truth of the facts stated in paragraph 2, namely,

(1) [1906] 1 K. B. 60, at p. 70. (2) 8 Q. B. D. 195.
(3) [1907] 1 K. B. 126.

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that the dwelling-house was an ordinary dwelling-house, the landlord residing in it and being rated for the whole tenement. Those things being established, a presumption of fact was raised which required to be rebutted in the particular case. In other words, there was a case to be answered. I understand the meaning of paragraph 4 of the case to be as follows: "I ascertained by answers to questions which I put to the assistant overseer and the registration clerk that in a great majority of cases it would be established to my satisfaction that the landlord had no control, so that the governing fact would be decided in favour of the voter, as in *Kent* v. *Fittall.* (1) " In my judgment, the revising barrister in relying upon that examination was acting upon matters which went far beyond inquiry into the circumstances of the particular vote, or even the circumstances of the class of vote before him; certainly beyond the circumstances of the particular vote. The examination only related to the conditions of letting in the great majority of cases. What that means, what the actual majority was, whether this particular house or the occupation by the person objected to and under discussion before the revising barrister would fall within that great majority or within the small minority, one has no means of judging. In my judgment, the mere statement of that which the revising barrister sets out in the case shews that he acted upon a presumption of fact, or supposed proof of facts, which went beyond the circumstances of the case which was under his consideration. It is useless to try to take short cuts as the revising barrister has attempted to do in this case. It may be more difficult and may require further time, but, given that the state of things set out in paragraph 2 of the case is established and proved, in my opinion, if the revising barrister believes that that proof applies to the particular houses and the particular occupation as to which the objection is taken, he should then inquire into the circumstances of the occupation in that particular case; he must not act upon general evidence with regard to the majority of houses similarly occupied in the borough. In the present case there is nothing to shew that the answers given by the assistant overseer and the registration clerk related to the

(1) [1906] 1 K. B. 60.

particular house in respect of the occupation of a part of which the vote was being considered. I am therefore of opinion that this appeal must be allowed, and that the case must go back to the revising barrister to complete his revision.

WALTON J. I agree, and have little to add.

The case raises a question of some considerable difficulty. We are enabled to deal with it, inasmuch as the revising barrister has very properly and fairly stated not merely his conclusion of fact as to whether there was prima facie proof, but also the reasons and matters which operated upon his mind and caused him to come to the conclusion at which he arrived, namely, that there was no prima facie proof of the ground of objection. We have to consider whether in taking those various matters into consideration he was acting correctly in point of law, and whether he has taken anything into account which he ought not to have taken into consideration in arriving at his decision. Sect. 28, sub-s. 10, of the Parliamentary and Municipal Registration Act, 1878, provides that if the objector appears he is to prove his notices and to give prima facie proof of the ground of objection. It is rather important to observe that the word used in s. 28, sub-s. 10, of the Act of 1878 is "proof," not "evidence." The section there says that the revising barrister "for that purpose may himself examine and allow the objector to examine the overseers or any other person on oath touching the alleged ground of objection, and unless such proof is given to his satisfaction" —that is, to the satisfaction of the revising barrister—"shall, subject as herein and otherwise by law provided, retain the name of the person objected to." Sect. 28, sub-s. 11, of the Act of 1878 says: "If such proof is given by the objector as herein prescribed, ... then unless the person objected to appears . . . . and proves that he was entitled . . . . to have his name inserted in the list," his name is to be expunged. So that if the revising barrister comes to the conclusion that there is prima facie proof of the ground of objection, the result is, not that the person objected to has his name expunged, but only that he has to appear and meet the objection. The question in the present case is, in substance, whether the person objected to ought

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not to have been called upon to meet the objection which had been raised.

Now it has been said in effect in many of the authorities, to which I need not refer, that if the facts which the revising barrister has found in paragraph 2 of the case exist, there arises a strong presumption that the person objected to is a lodger and not an occupier—a presumption upon which the revising barrister may act, and which he may accept as sufficient prima facie proof of the ground of objection. In my opinion it must always be for the revising barrister to judge whether the evidence brought before him on behalf of the objector—which may not be strictly legal evidence—amounts to satisfactory prima facie proof or not. The revising barrister has to decide that question. In the present case the revising barrister has said in effect: "True, the facts stated in paragraph 2 of the case by themselves raise the presumption that the person objected to is not an occupier, and that the landlord of the house retains some control over the rooms occupied by the person objected to. That is true. Still, that is only a presumption which may be rebutted. I find from the evidence which was given that in the town of Devonport it is a very usual thing, in the case of houses which are occupied by the landlord and lodgers under the conditions set out in paragraph 2 of the case, for the landlord not to retain any control, and it is so usual that I think it rebuts the presumption in this particular case which would naturally be drawn from the facts set forth in paragraph 2 of the case."

The question is whether the revising barrister had any right, in dealing with the particular person objected to, to look at what was a very common mode of occupation in other houses in Devonport. Lord Alverstone C.J. has come to the conclusion, in which I entirely agree, that in looking at the way in which other houses were occupied by landlords and (I will call them) lodgers he was going outside the range of the particular inquiry before him, which related to the relations between the landlord and the person objected to in the particular house in question. For that reason, not because he asked questions (for I think he had a right to do that), but on the ground that he has acted upon evidence in respect of matters which were, I think, irrelevant to

the particular inquiry which he was holding, and upon that ground only, I am of opinion that he must complete the revision.

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SUTTON J. Against the objector the revising barrister admitted the evidence set out in paragraph 4 of the case. In my opinion, on the true construction of s. 28 of the Parliamentary and Municipal Registration Act, 1878, he was not at liberty to do that. That appears to me to be the view taken in *Kent* v. *Fittall* (No. 2). (1)

Appeal allowed.

Solicitors for appellant: *Ayrton, Biscoe & Barclay.*

Solicitors for respondent: *Cunliffes & Davenport*, for *R. J. Fittall, Devonport.*

J. E. A.

PITTS, APPELLANT *v.* MICHELMORE, RESPONDENT.

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Nov. 4.

Parliament—Franchise—Rating—Successive Occupation—Representation of the People Act, 1832 (2 & 3 *Will.* 4, *c.* 45), *ss.* 27, 28, 30—*Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *ss.* 3, 26, 56, 59—*Poor Law Amendment Act*, 1868 (31 & 32 *Vict. c.* 122), *s.* 38.

The appellant, who was on the occupation list of voters, was the inhabitant occupier, during the whole of the qualifying period from July 15, 1907, to July 15, 1908, of two dwelling-houses in immediate succession. He occupied the first house until June, 1908, when he went into occupation of the second house. He was rated and paid all the rates due in respect of the first house, but inasmuch as the building of the second house was not completed in April, 1908, when the rate for the half-year ending September 29, 1908, was made, the house was not entered in the rate book, and no one was rated in respect thereof until after the termination of the qualifying period, and no claim to be rated in respect thereof nor tender or payment under s. 30 of the Representation of the People Act, 1832, of the sum which would have been due had he been rated was ever made by the appellant:—

Held, that the appellant was not entitled to the franchise under ss. 3 and 26 of the Representation of the People Act, 1867.

CASE stated by the revising barrister for the Torquay division of the county of Devon.

At Courts holden on September 9, 11, and 12, 1908, at Torquay,

(1) [1908] 2 K. B. 933.

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Brixham, and St. Marychurch, objection was duly taken to the names of Frederick William Pitts and six other persons, whose names were scheduled to the case, being retained on division 1 of the occupiers' lists of their respective parishes on the ground that they had not been rated in respect of the qualifying premises during the whole of the qualifying period of occupation in accordance with the provisions of s. 3 of the Representation of the People Act, 1867.

Pitts occupied during the whole of the qualifying period in immediate succession as dwelling-houses premises known as 10, Peditford Terrace, Torquay, in the parish of Tormoham, and 3, Alexandra Terrace, Torquay, in the same parish, and had been duly rated and had paid all rates due in respect of the first-named premises.

Pitts came into the occupation of 3, Alexandra Terrace in June, 1908; the then current rate for the parish had been made on April 6 preceding for the period ending September 29, 1908, but, by reason of the fact that on the date of the making of the rate the premises were unfinished, no one was then rated in respect thereof, and in fact no one was rated in respect thereof between the commencement of Pitts' occupation and the termination of the qualifying period.

No claim to be rated in respect of the premises 3, Alexandra Terrace and no tender or payment under the Representation of the People Act, 1832 (2 & 3 Will. 4, c. 45), s. 30, and the Parliamentary Electors Registration Act, 1868 (31 & 32 Vict. c. 58), s. 30, of the sum which ould have been due had he been rated were ever made by Pitts.

With regard to the six other scheduled cases, in one of them the facts were similar to those in Pitts' case; and in the remaining five cases the facts were also similar to those in Pitts' case, with the following qualifications. In two of the cases the persons objected to in fact paid the sums, which would have been due had they been rated, on a date subsequent to the termination of the qualifying period as from the commencement of their occupation, and in the other three cases the overseers on dates subsequent to the termination of the qualifying period inserted the names in the current rates in pursuance of the powers conferred

upon them by s. 38 of the Poor Law Amendment Act, 1868 (31 & 32 Vict. c. 122), and charged them and were in fact paid by them in full, after the termination of the qualifying period, the sums due from the date of their going into occupation of the premises.

The revising barrister held that none of the above-mentioned persons were entitled to have their names registered on the respective lists and expunged their names therefrom.

If the Court should be of opinion that his decision was wrong the names were to be restored to the lists.

F. F. Daldy, for the appellant. The decision of the revising barrister was wrong. The question arises in respect of a dwelling-house qualification conferred by s. 3 of the Representation of the People Act, 1867, which by s. 2 of the Representation of the People Act, 1884 (48 & 49 Vict. c. 3), is extended to counties. That section confers the franchise upon every man who (sub-s. 2) has during the twelve months been "an inhabitant occupier, as owner or tenant, of any dwelling-house within the borough," and (sub-s. 3) "has during the time of such occupation been rated as an ordinary occupier in respect of the premises so occupied by him within the borough to all rates (if any) made for the relief of the poor in respect of such premises," and (sub-s. 4) has on or before July 20 paid all the poor rates payable by him in respect of the premises up to the preceding January 5. By s. 26 the occupation of different premises in immediate succession in the borough has the same effect as continued occupation of the same premises. Sects. 56 and 59 apply, as nearly as circumstances admit, the provisions of the Representation of the People Act, 1832, to the franchises conferred by the Act of 1867. It is necessary, therefore, to look back at the Act of 1832 to see what are the provisions in regard to rating in the case of successive occupation. By s. 27 of the Act of 1832 the 10*l.* occupation franchise was conferred upon voters in boroughs, the conditions of the franchise being that the occupier must have occupied the qualifying premises for the qualifying period of twelve months, and, where there is a rate for the relief of the poor in the parish, he must have been rated in respect of the premises to all rates for the

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relief of the poor made during the time of his occupation, and must have paid on or before July 20 all the poor rates and assessed taxes payable in respect of the premises previously to, as now amended, January 5. That section requires in the case of occupation of the same premises during the whole qualifying period that the occupier must be rated and pay the rates. Sect. 28 allows successive occupation of different premises, but in such a case the only condition imposed by that section is that the occupier shall have paid all the poor rates and assessed taxes which shall have become payable from him in respect of the premises previously to January 5. In the case of successive occupation the occupier need not be rated; he need only have paid the rates payable up to January 5: *Rogers* v. *Lewis*. (1) All the rates here which became payable up to January 5, namely, those in respect of the first house, have been paid, and no question arises as to payment. The only question is whether it is necessary that the second house should have been rated. The condition as to successive occupation specified in s. 28 applies to successive occupation of a dwelling-house under s. 26 of the Act of 1867: *Moger* v. *Escott*. (2)

The case of *Palmer* v. *Wade* (3) is distinguishable from the present case. That case merely decided that where a person went into occupation of a new house during the qualifying period, and while he was in occupation a rate was made from which the house was omitted, the occupier was not entitled to be registered as a voter. The Court there merely followed the decision of the Court of Appeal in Ireland in *M'Gaffigan* v. *Riddall* (4), where the facts were similar. In the present case the rate was made before the second house was finished and before the appellant went into occupation of it. The house was therefore not upon the rate book, and there was no rate to which the house could have been rated until after the expiration of the qualifying period. In similar circumstances it was held by the Court of Appeal in Ireland, in *Criglington* v. *Anderson* (5), that the occupier was entitled to the franchise,

(1) (1859) 7 C. B. (N.S.) 29.
(2) (1872) L. R. 7 C. P. 158.
(3) [1894] 1 Q. B. 268.
(4) (1890) 28 L. R. Ir. 257.
(5) (1889) 26 L. R. Ir. 131.

the ground being, as explained by FitzGibbon L.J. in *Riddall* v. *M'Aleer* (1), where *Criglington's Case* (2) was recognized as good law, that "it is sufficient in the case of new houses valued for the first time during the qualifying period if they are so valued and are rated to the first rate made after they come into existence, and after they have for the first time become 'rateable hereditaments' in the widest sense, i.e. premises that ought to be rated." *Criglington's Case* (2) was again followed in *Gallagher* v. *Chambers*. (3) There being no obligation, in the case of successive occupation, that the occupier should be rated, there was no necessity for the appellant to apply under s. 30 of the Representation of the People Act, 1832, which is applied by s. 30 of the Parliamentary Electors Registration Act, 1868, to occupiers of premises capable of conferring the franchise for a county under the Representation of the People Act, 1867, and therefore now to occupiers of dwelling-houses in a county, or under s. 38 of the Poor Law Amendment Act, 1868, which latter enactment first gave power to the overseers to put a new house on the rate book during the currency of the rate, to have the house or his name entered in the rate book. The present case is within the decisions in *Criglington's Case* (2), *Gallagher's Case* (3), and *M'Aleer's Case* (4), and does not come within the decisions in *M'Gaffigan* v. *Riddall* (5) and *Palmer* v. *Wade*. (6) No distinction can be drawn for this purpose between the case of Pitts and any of the other six scheduled cases. [He also referred to Lawson's Reg. Cas., 1885 to 1893, p. 143, note; Rogers on Registration, 16th ed. pp. 128, 134; and Mackenzie and Lushington's Registration Manual, 2nd ed., p. 181, note.]

The respondent did not appear.

LORD ALVERSTONE C.J. In this case we are unfortunately in the position of having heard arguments on one side only, and I have had considerable doubts in the matter, which have not

(1) (1890) 28 L. R. Ir. 257, at p. 268.
(2) 26 L. R. Ir. 131.
(3) (1892) Lawson's Reg. Cas., 1885 to 1893, p. 138.
(4) 28 L. R. Ir. 257, 260.
(5) 28 L. R. Ir. 257.
(6) [1894] 1 Q. B. 268.

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altogether disappeared, but upon the whole I think that the decision of the revising barrister is right.

In my opinion the decisions which have been referred to in the argument have been correctly summarized in Rogers on Registration, 16th ed. p. 134, where it is said that "although under s. 28"—of the Representation of the People Act, 1832—"the successive occupier need not himself be rated to the second house, yet it must be in the rate book, otherwise the occupation will not confer the franchise"; and for that proposition he refers to *Palmer* v. *Wade* (1), *Wade* v. *Perkins* (2), and *M'Gaffigan* v. *Riddall*. (3) That seems to me to be a correct statement of the result of those decisions, and I need hardly say how important it is in a matter of this kind that the law should be laid down clearly and free from doubt, so that revising barristers and others who have to deal with registration matters may know exactly what the law is.

For the purpose of seeing whether the proposition stated in Rogers on Registration is correct, one must examine carefully the statutes, and if that is done, it will be seen that it is a condition of the acquisition of the franchise that the qualifying premises must be the subject of rates during the whole of the qualifying period. Sect. 27 of the Representation of the People Act, 1832, conferred the right of voting in boroughs upon duly registered occupiers of houses of the clear annual value of 10*l*., and it provided that no such person should be so registered in any year unless he should have occupied the premises for twelve calendar months next previous to the last (now the 15th) day of July in such year, "nor unless such person, where such premises are situate in any parish or township in which there shall be a rate for the relief of the poor, shall have been rated in respect of such premises to all rates for the relief of the poor in such parish or township made during the time of such his occupation so required as aforesaid, nor unless such person shall have paid on or before the twentieth day of July in such year all the poor's rates and assessed taxes which shall have become payable from him in respect of such premises previously to the

(1) [1894] 1 Q. B. 268. (2) (1893) Fox & Sm. Reg. Cas. 338.
(3) 28 L. R. Ir. 257.

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sixth day of April"—now January 5—"then next preceding." Sect. 28 allows the qualifying premises to be premises occupied in succession. That section provides that "the premises in respect of the occupation of which any person shall be entitled to be registered in any year, and to vote in the election for any city or borough as aforesaid, shall not be required to be the same premises, but may be different premises occupied in immediate succession by such person during the twelve calendar months next previous to the last"—now the 15th—"day of July in such year, such person having paid, on or before the twentieth day of July in such year, all the poor's rates and assessed taxes which shall previously to the sixth day of April"—now January 5—"then next preceding have become payable from him in respect of all such premises so occupied by him in succession." It seems to me that, as s. 28 is dealing with the same subject-matter as s. 27, merely allowing the qualifying premises to be two or more sets of premises occupied in immediate succession, though it only says that the occupier shall pay all poor's rates and assessed taxes payable in respect of the premises, the true intention of the enactment is that, to entitle the occupier to be registered as a voter, all the conditions specified in s. 27 must be fulfilled in respect of all the premises so occupied in succession. I agree that it was decided in the case of *Rogers* v. *Lewis* (1), which was a case of successive occupation, that it is not necessary that the occupier's name should appear in the rate book. It is sufficient if he has paid the rate. That decision is relied upon by the appellant as shewing that that which is expressly made a condition by s. 27 of the Act of 1832, namely, that the occupier must have been rated, does not apply in the case of successive occupation. It is important, however, to observe that in that case the second house was on the rate book, and that Erle C.J. was of opinion that the occupier was sufficiently rated, though the name of the owner of the premises only appeared in the rate. Therefore that case cannot be said to be any authority for the contention that a person can be registered as a voter in respect of the occupation of premises which are not rated during part of the qualifying

(1) 7 C. B. (N.S.) 29.

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period. It is also important to observe in this connection that, in order to prevent a person from being deprived of the franchise, the occupier of premises is given by s. 30 of the Act of 1832 the right of demanding to be rated in respect of the premises and of tendering the full amount of the rates then due in respect of the premises, and upon that being done the overseers are required to put the name of the occupier upon the rate for the time being; and in case the overseers neglect or refuse to do so, the occupier shall, for the purposes of the Act, be deemed to have been rated to the relief of the poor in respect of the premises from the period at which the rate shall have been made in respect of which he shall have claimed to be rated. It seems to me that those three sections taken together impose upon the person claiming to be registered as a voter the obligation either of having been rated and paid the rates, or of having put himself in that position by demanding to be rated and tendering the rates which would properly be payable in respect of the premises; and all that *Rogers* v. *Lewis* (1) decided was that in the case of successive occupation, if the house was rated, the payment of rates by the occupier was sufficient, though his name did not appear in the rate book.

I now come to the Representation of the People Act, 1867, which by s. 3 introduced a new qualification. That section provides that every man shall be entitled to be registered as a voter who has during the qualifying period been an inhabitant occupier, as owner or tenant, of a dwelling-house, and "(3.) has during the time of such occupation been rated as an ordinary occupier in respect of the premises so occupied by him within the borough to all rates (if any) made for the relief of the poor in respect of such premises, and (4.) has on or before the twentieth day of July in the same year bona fide paid an equal amount in the pound to that payable by other ordinary occupiers in respect of all poor rates that have become payable by him in respect of the said premises up to the preceding fifth day of January." By s. 26 different premises occupied in immediate succession have the same effect in qualifying a person to vote as continued occupation of the same premises. That dwelling-

(1) 7 C. B. (N.S.) 29.

house franchise has by s. 2 of the Representation of the People Act, 1884, been extended to counties, and it seems to me that s. 30 of the Parliamentary Electors Registration Act, 1868, has now extended s. 30 of the Representation of the People Act, 1832, to the inhabitant occupiers of dwelling-houses in counties. Therefore the effect of these enactments is to confer upon the inhabitant occupiers of dwelling-houses in counties the right to demand to be rated, and to protect them if the overseers refuse to enter their names in the rate book. Ever since the passing of the Poor Law Amendment Act, 1868, s. 38, there has been power in the overseers of a parish, where the poor rate is not made under a local Act, in the case of a new house or building to enter the house or building with the name of the occupier thereof in the rate book, and to require the occupier to pay a certain sum in respect of rates, and the person so charged shall be considered as actually rated. These two Acts, which were both passed in the year 1868, seem to me to protect a person against the loss of his vote by the non-rating of the property in respect of which he desires to qualify. It is not disputed that in the case of the occupation of the same house during the whole of the qualifying period the house must be on the rate book during the whole of that period, but it is contended that, by virtue of s. 28 of the Act of 1832 as applied to the dwelling-house franchise by ss. 56 and 59 of the Act of 1867, that is not necessary in the case of the second house where two houses are occupied in succession. I cannot agree. I see nothing to lead me to the conclusion that there is to be less strictness in the matter of rating in respect of the house occupied during the last part of the qualifying period as compared with the house occupied during the first part. It seems to me that the decision in *Palmer* v. *Wade* (1) is contrary to that contention. No doubt there was this distinction between that case and the present one, that there a rate was made during the qualifying period after the occupier had gone into occupation of the second house, and the house was not included in the rate. No reliance, however, seems to have been placed upon that circumstance, and it certainly was not referred to in the judgment of

(1) [1894] 1 Q. B. 268.

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the Court. The facts, apart from that suggested distinction, appear to be almost identical with those in the present case. In that case the house "had been built on land of which the owner had not previously had any beneficial occupation, and was not comprised in any rate made before that allowed in August, 1893"—the qualifying period ending on July 15, 1893. "It was not the practice of the board to insert new houses in existing rates, or to make supplementary rates in respect of them. No claim to be rated or tender of rates in respect of the house was made either by the owner or by the voter before August, 1893." In those circumstances the Court held that the occupier was not entitled to the franchise. Lord Coleridge C.J., quoting with approval the language of FitzGibbon L.J. in *M'Gaffigan* v. *Riddall* (1), with reference to s. 9, sub-s. 9, of the Representation of the People Act, 1884, said: "This enactment seems to me to imply that, except in the case of exempt premises, no one is entitled to be registered in respect of any dwelling-house for which no one is rated and no rates are paid." That seems to me to be a decision covering the present case and binding upon this Court, and if any distinction is to be drawn between the two cases it must be drawn by the Court of Appeal; and further it, in my opinion, shews that, where the qualifying premises occupied in succession are not both in the rate book during the time when they are so occupied respectively, the occupier cannot claim a vote. If the occupier had desired to protect himself he could have applied to be rated under s. 30 of the Representation of the People Act, 1832, or under s. 38 of the Poor Law Amendment Act, 1868. I express no definite opinion in a case where no rate has been made at all, though, as at present advised, I think that in such a case the occupier would not lose his vote by reason of the premises not being in the rate book.

The case of *Criglington* v. *Anderson* (2) to my mind presents some difficulty. If I could have seen that the same statutes as to rating were applicable in Ireland as in England, I might have been inclined to follow that decision, especially as it was considered in *M'Gaffigan* v. *Riddall* (3) to be good law. I am not

(1) 28 L. R. Ir. 257, at p. 264. (2) 26 L. R. Ir. 131.
(3) 28 L. R. Ir. 257.

satisfied, however, that in *Criglington's Case* (1) there was any power in the occupier to get the house put on the rate book. But, however that may be, the decision in *Palmer* v. *Wade* (2) governs this case, and I think that the true effect of that decision has been correctly stated in Rogers on Registration, 16th ed. p. 134, that the second house must be in the rate book, otherwise the occupation will not confer the franchise.

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For these reasons I think that the decision of the revising barrister was right, and that the appeal must be dismissed.

WALTON J. I agree with the conclusion arrived at by my Lord and with the reasons which he has given for that conclusion, and I have very little to add. As I understand the facts, the rate was made in April, 1908, for the six months ending on September 29, 1908. When that rate was made the house in question, 3, Alexandra Terrace, was not completed; it was in course of erection and was consequently not inserted in the rate book in April, when the rate was made. In the following June it was completed, and the appellant entered into occupation of it in that month. As has been pointed out, the appellant might then have applied to the overseers, if he had so pleased, to have the house inserted in the rate book under s. 38 of the Poor Law Amendment Act, 1868, and he might further have applied, if necessary, to the overseers to have his name entered in the rate book in respect of the house under s. 30 of the Representation of the People Act, 1832. He did not do so, and neither the house nor the appellant's name was entered in the rate book in respect of the period between the date when he entered into occupation of it and the end of the qualifying period on July 15, 1908. It seems to me to have been decided by this Court in *Palmer* v. *Wade* (2), following the decision of the Court of Appeal in Ireland in *M'Gaffigan* v. *Riddall* (3), that the house must be in the rate book, otherwise the occupation will not confer the franchise, though, as was decided in *Rogers* v. *Lewis* (4), it is not necessary that the occupier should himself be rated in respect of the second house. I should like to point out that in *M'Gaffigan*

(1) 26 L. R. Ir. 131.
(2) [1894] 1 Q. B. 268.
(3) 28 L. R. Ir. 257.
(4) 7 C. B. (N.S.) 29.

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v. *Riddall* (1) FitzGibbon L.J., who delivered the leading judgment, said (2) that "the guardians could not insert unrated premises upon the rate," and that case seems to have been decided upon the footing that the house could not have been inserted in the rate book by the guardians, though a tender of the proper amount of the rate was made during the qualifying period, and a demand was subsequently made by the occupier to be rated. If that is so, the present case is an a fortiori case, because clearly under s. 38 of the Poor Law Amendment Act, 1868, the house might have been inserted in the rate book. As at present advised I feel some difficulty in reconciling the decisions of the Court of Appeal in Ireland in *Criglington* v. *Anderson* (3) and *M'Gaffigan* v. *Riddall* (1), though I do not say that they are not reconcilable. But, however that may be, the decision in *M'Gaffigan* v. *Riddall* (1) has been adopted and followed by this Court in *Palmer* v. *Wade* (4), and I think that we are bound by that decision. Following that decision, in my opinion this appeal must be dismissed.

SUTTON J. agreed.

Appeal dismissed.

Solicitors for appellant: *Brooks, Jenkins & Co., for C. H. Clode, Torquay.*

(1) 28 L. R. Ir. 257.
(2) 28 L. R. Ir. at p. 268
(3) 26 L. R. Ir. 131.
(4) [1894] 1 Q. B. 268.

W. F. B.

[IN THE COURT OF APPEAL.]

C. A.

1908

Oct. 19, 20; *Nov.* 18.

PETER WALKER & SON, LIMITED *v.* HODGSON.

Practice—Discovery—Interrogatories—Action for Slander—Defence of Fair Comment.

The defendant in an action for slander, alleged to have been uttered in a speech made by him as chairman at a licensing meeting, pleaded a defence of fair comment in the following terms: "In so far as the words complained of consist of statements of fact the same are in their natural and ordinary signification true in substance and in fact. In so far as they consist of comment the same are fair and bona fide comment upon matters of public interest." There was no plea of justification. Upon an application by the defendant for leave to administer interrogatories to the plaintiffs directed to proving the truth of the statements of fact in his speech and in the particulars delivered by him of the materials upon which his defence of fair comment was based:—

Held, that the defendant was entitled, notwithstanding the absence of a plea of justification, to administer interrogatories with the object of obtaining admissions of the truth of the material statements of fact in the speech and particulars alleged to be defamatory.

Appeal of the defendant from an order of Bray J. at chambers refusing leave to administer interrogatories to the plaintiffs.

The plaintiffs, a limited company carrying on the business of brewers and wine and spirit merchants and owners of licensed houses in Lancashire, Yorkshire, Cheshire, and other counties, sued the defendant, the chairman of the licensing justices for Crewe, to recover damages for slander, alleging that in a speech or address made by him at a general annual licensing meeting and transfer sessions held at the police court, Crewe, he falsely and maliciously spoke and published of the plaintiffs, and of the plaintiffs in the way of their trade and business, certain words, which were thus set out in the statement of claim:—

"There are some other matters, probably, which may be in the minds of some people as they are in the minds of the Bench, as to what has occurred during the past year with reference to the conduct of licensing business, and which are not included in the superintendent's report. They don't come within the province of the superintendent to make comment on such matters, but I have been asked by the magistrates to say

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something about them. This last year has been a year of considerable interest to the Bench with reference to a matter which has come before them, which they consider exceedingly serious. They have had suggested to them for a long time that a number of the licensees in this town" (meaning the licensees of the licensed public-houses in Crewe of which plaintiffs are owners) "who were supposed to be bona fide tenants, and who have produced agreements before this Court of tenancy with their owners on the face of which they seemed to be described clearly as bona fide tenants, whereas the general opinion has been that they were not tenants at all, but simply managers in receipt of weekly wages, acting as agents of the Brewery Company" (meaning the plaintiffs) "only. A case has occurred recently" (meaning the case of one Hannah Brown, the then licensee of the Blue Cap Dog public-house, Crewe, of which plaintiffs are owners) "in which the magistrates, after a great deal of care and patience, under exceedingly great provocation, came to the conclusion that such a suspicion was proved; and they believed that these agreements in those cases, and in that particular case, were bogus. And they, therefore, considered the practice of presenting such agreements as a fraudulent practice. They also came to the conclusion that the outgoing tenant in that case" (meaning the said Hannah Brown) "was being cruelly wronged, dispossessed of her licence because she refused to carry out a practice which she knew to be fraudulent, and is consequently dispossessed by the Brewery Company" (meaning the plaintiffs) "of her licence. The magistrates consider that a Court of justice ought not to be used as a means for the perpetuation of corrupt practices. Whether the law gives us power to stop a corrupt practice or not, it seemed to the magistrates that they ought to object to it. They believed they had the power to stop it as far as they could stop it, but on an appeal to quarter sessions" (meaning an appeal to the Chester quarter sessions wherein one Peter Leigh and the plaintiffs were appellants and the defendant and other justices of the borough of Crewe were respondents) "they were reversed without having an opportunity of stating their reasons for objecting to the transfer of the licence. Counsel for the magistrates asked the Court of quarter sessions to state

a case on the points of law, and sanction was granted for stating a case. The magistrates having conferred with their legal advisers, with eminent legal advisers too, have been sustained in their opinion that they have legal grounds for the course they took, and that the case should be proceeded with. In view, however, of the new Licensing Bill which in a very few days it is anticipated will be laid before Parliament, and in which it is anticipated that the powers of the magistrates are not only to be restored but strengthened, the magistrates have come to the conclusion that, instead of pursuing the matter in what would be somewhat expensive litigation, they will leave it where it stands after just giving this statement of the position, in the hope that possibly in future years there may be no occasion for drawing attention to what they believe to be most reprehensible practices. As far as we are concerned, we can have no part or lot with sanctioning anything that is corrupt, whatever may be done elsewhere. The magistrates, so far as their views of these matters are concerned, are prepared to take their stand behind Lord Justice Lindley, probably one of the most eminent licensing justices in this country, and they intend to act according to the advice he has given, if they consider it necessary to do so. We have no bias, however, except the general one of objecting to anything which seems corrupt. Anything that appears to be wrong or corrupt that appears before them they will endeavour to stop as far as they can. I haven't said anything more about this case, and I don't intend. It is very easy, of course, for wealthy brewery companies" (meaning the plaintiffs) "to engage expensive counsel in order to browbeat the local Bench" (meaning the justices for the borough of Crewe) "to deter them from doing their duty in any future case. So far as that matter is concerned we have nothing to say. We don't intend to reply to counsel. We have been content to do what seemed to be our duty without fear or favour, affection or ill will. Whether we please or displease, whether it is brewery company or licensee, we must do our duty, and we have nothing whatever to say as to whatever comments may be made on that decision. The renewal of the licences of the following houses will be adjourned."

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[Here followed a list of nine houses.]

"These comprise the list of houses owned by Messrs. Walker & Company" (meaning the plaintiffs). "The superintendent of police will be instructed to issue notice of objection to the licensees of these houses mainly on the ground of fitness. The specific terms of the objection will be issued by the clerk and the police, mainly that they are not bona fide tenants and that the agreements or assurances which they have with their brewers" (meaning the plaintiffs) "and which have been disclosed to the Bench are not bona fide, not genuine, have not been acted upon, and that they have other assurances and agreements which are in operation which have not been disclosed to the Bench. And they will be required to produce trade books, weekly takings books, other documents and receipts which have passed in the course of trade, and stocktaking memoranda and so on between themselves and their owners for the information of the Bench at the adjourned sessions. Every one of these cases will be considered at the adjourned sessions. I have gone into the list of all these houses, their history for many years past. The history is a very sad one, and the magistrates considered they would not be doing their duty without they endeavoured to get to the bottom of the cause of this sad history. A number of the tenants either died in delirium tremens or through drink, some of them are now destitute, nearly all the houses have been convicted from one cause or another, and in many respects, palpably, there is a necessity for seeing whether or not the condition of tenancy is such as to lead to such a conduct in the trade of these houses as is to the interests of the public."

The innuendo contained in paragraph 4 of the statement of claim was in the following terms: "The said words mean and were understood to mean that the plaintiffs had been guilty of corrupt, dishonest and fraudulent conduct in and about the carrying on of their said business; that the plaintiffs had entered into fraudulent and bogus agreements with their tenants; that they had conspired with their said tenants to withhold information from and to deceive the licensing justices of Crewe; and that they were unfitted to be the owners of licensed property or to carry on their said business as aforesaid."

The defence, after denying the publication and the innuendo, pleaded that the occasion of the alleged publication was absolutely privileged, upon the grounds that the words were spoken, if at all, by the defendant in his capacity and office of chairman of the general annual licensing meeting whilst engaged in the performance of the duties of the office, and that they were spoken, if at all, bona fide without malice towards the plaintiffs and with the object of protecting the interests of the public and in the honest belief that every word he spoke was true. It then proceeded in paragraph 8 in the following terms : "In so far as the words complained of consist of statements of fact the same are in their natural and ordinary signification true in substance and in fact. In so far as they consist of comment the same are fair and bona fide comment upon matters of public interest."

Immediately after delivery of the defence a summons was taken out by the plaintiffs for "particulars of the justification pleaded in paragraph 8 of the defence," upon which an order was made on April 28, 1908, by a Master that the defendant should within fourteen days deliver to the plaintiffs "particulars under paragraph 8 of the defence of the materials on which his comments were based, he stating that the defence is one of fair comment and not of justification." Particulars under the order were duly delivered, the nature of which is set out in the judgment of Vaughan Williams L.J.; they consisted, shortly, of reports of committees of magistrates and police, proceedings at licensing sessions, &c., particulars as to the character of the tenancies of the plaintiffs' licensed houses, returns of licensed houses in Crewe, the deaths of certain licensees from drink, convictions of certain of the plaintiffs' licensees, &c.

The defendant then applied for leave to administer certain interrogatories, twenty-five in number, to the plaintiffs. The first two interrogatories were admittedly unobjectionable. The third asked whether the words were not spoken by the defendant in his capacity and office of chairman of justices at the general annual licensing meeting and special sessions and whilst he was engaged in the performance of the duties of that office.

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The fourth inquired as to the report of a committee appointed in 1891 by the quarter sessions for Cheshire. Interrogatories 5 to 17 inquired as to certain convictions of persons alleged to be licensees of the plaintiffs' houses, and No. 18 asked as to reports alleged to have been made by the police from the year 1893 onwards as to the conduct of licensed victuallers and beer retailers in Crewe. No. 19 asked as to the proportion of the licensees of the plaintiffs' houses in and near Liverpool on a given date who were managers and not tenants, and No. 20 asked as to a return of licensed houses in Crewe prepared in 1903 by the clerk to the justices. No. 21 asked whether six named persons, licensees of the plaintiffs' houses, between 1889 and 1908 had not died on certain named dates of delirium tremens or through drink, and No. 22 asked whether four named persons, tenants of the plaintiffs' houses, were not destitute on a certain date. Interrogatory 23 was in the following terms: "Is it not a fact that up to 1894 George Withers, the licensee of the Blue Cap Dog Inn, was for some time a servant of the plaintiffs, receiving a weekly or some other and what wage $\frac{\text{and}}{\text{or}}$ accounting to the plaintiffs for the takings and the profits of the business? Was not an agreement relating to the tenancy of the Blue Cap Dog entered into between the plaintiffs and George Withers, dated September 16, 1895? Was such agreement verbal or in writing? Were not the terms of the agreement submitted to the said justices for approval? Was not the licence from time to time renewed to George Withers upon the understanding as between the plaintiffs and the justices that the terms of the agreement were being adhered to? Is it not a fact that the terms of the agreement were never adhered to? Is it not a fact that George Withers did not pay the rent reserved by the agreement? that George Withers did not depart in any way from his original position as manager at weekly wages, accounting to the plaintiffs weekly for the takings and expenses? If any, in what respect was his position altered after the execution of the agreement?" The 24th interrogatory inquired whether a tenant, manager, or representative of the plaintiffs was present at certain meetings or sessions of the Crewe justices from 1893 onwards, and the 25th inquired

whether certain newspaper extracts ranging over a period of fifteen years were not fair and accurate reports of the proceedings referred to in them, and, if nay, in what respects they were unfair or inaccurate.

The Master allowed certain of the interrogatories, but, on appeal to Bray J., the learned judge, being of opinion that although a few were unobjectionable the interrogatories as a whole were, in the absence of a plea of justification, oppressive and unreasonably exhibited, disallowed the whole of them. The defendant appealed.

Hugh Fraser (*Isaacs, K.C.*, with him), for the defendant. The learned judge was wrong in holding that, as the defence was based upon fair comment and not upon justification, the interrogatories as a whole were oppressive and such as ought not to be allowed to be administered. It is true that the defence in paragraph 8, which is in the same terms as that in *Digby* v. *Financial News* (1), is one of fair comment only; but in order to establish his defence of fair comment the defendant must prove the convictions of the licensees of the plaintiffs' houses and the condition of the plaintiffs' tenants, the facts relating to which are all in the knowledge of the plaintiffs. No doubt the facts relied upon to support the defence of fair comment, e.g., the convictions, are capable of being proved in another way at the trial, but the defendant is entitled to obtain from the plaintiffs admissions as to the truth of such facts in order to avoid incurring large and unnecessary costs. The defendant is clearly entitled to interrogate the plaintiffs upon the report of the quarter sessions committee as being a matter of public interest. The 25th interrogatory is not pressed.

F. E. Smith, K.C. (*Ellis Griffith* with him), for the plaintiffs. The learned judge was right in disallowing the whole of the interrogatories; his view is supported by the case of *Oppenheim & Co.* v. *Sheffield.* (2) It is not sufficient that there are a few unobjectionable interrogatories among many improper ones. The first two are trivial and there is no objection to their being answered, but the third is an argumentative interrogatory

(1) [1907] 1 K. B. 502. (2) [1893] 1 Q. B. 5.

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upon a point of law material to the case. Nos. 4 and 18 relate to a report of a committee of justices which sat eighteen years ago, and they should be disallowed. Nos. 5 to 17 ask for information as to convictions which could easily be proved in the ordinary way, and they are doubly oppressive in that they ask in each instance whether the licensee was a tenant or a manager. But the general objection to the interrogatories is that they cannot be asked at all. The substance of the libel is that the plaintiffs fraudulently made bogus agreements with their tenants, thereby deceiving the licensing justices; and if the defendant had pleaded justification the interrogatories could have been asked. But it is clear that in the absence of a plea of justification the defendant cannot interrogate the plaintiffs as to the truth of the statements complained of as libellous: *Lord Hindlip* v. *Mudford*. (1) In the present case fact and comment are so confused and intermingled in the defendant's speech that it is difficult to distinguish between them. [He also cited *Hunt* v. *Star Newspaper Co.* (2)]

Isaacs, K.C., in reply. Where there is a defence of fair comment it is necessary for the defendant to set up the truth of the facts relied on in support of that defence, for you cannot get fair comment until you prove the truth of the facts on which the fair comment is based. The defendant has to prove more than that these facts had come before the committee of quarter sessions; he must shew that the facts themselves are true—in other words, that there are facts from which he might fairly draw the inference which he did. *Lord Hindlip* v. *Mudford* (1) is distinguishable; the defence in that case did not allege that the facts commented on were true, but merely that the alleged libel was a fair and bona fide comment on a matter of public interest. If the truth of the facts is necessary in order to base a plea of fair comment, the defendant must frame his defence in the form here adopted, and he will then be entitled to interrogate. The object of interrogating in the present case and similar cases is to save the expense of proof.

Cur. adv. vult.

(1) (1890) 6 Times L. R. 367. (2) [1908] 2 K. B. 309.

Nov. 18. VAUGHAN WILLIAMS L.J., after stating that the Court intended to allow some of the interrogatories, but that the counsel for the parties ought to agree as to which should and which should not be answered, read the following judgment:—This is an appeal from an order of Bray J. varying an order of a Master, who had allowed certain interrogatories out of a number proposed by the defendant for the examination of the plaintiff company, and had disallowed the others. Bray J. rejected the whole of the proposed interrogatories. [His Lordship read several extracts from the defendant's speech as set out in the statement of claim, and continued:—]

I have now set forth enough of the slander alleged in the statement of claim, and of the innuendo, to ascertain what is the substance of the words complained of, and of the innuendo, and how far the words support the innuendo. It seems to me that the speech complained of does not allege that the plaintiffs in fact carry on their business in a corrupt, dishonest, and improper manner, conspiring to deceive the justices of Crewe, but only that the magistrates have had such suggestions and information laid before them and such cases brought before them on applications for renewals of licences, and in particular the case of the Blue Cap Dog, a house owned by the plaintiff company, and that in their honest opinion as magistrates they think there is a "necessity for seeing whether or not the condition of tenancy is such as to lead to such a conduct in the trade of these houses as is to the interests of the public," that is to say, the houses set forth in the list and owned by the plaintiffs. Let us look, then, at the amended defence. There is no plea of justification as such. What the defendant pleads in paragraph 8 is that "in so far as the words complained of consist of statements of fact the same are in their natural and ordinary signification true in substance and in fact. In so far as they consist of comment the same are fair and bona fide comment upon matters of public interest." This form of pleading, which I always think very indefinite and embarrassing, has, however, been adopted and sanctioned ever since the decision of Mathew and Grantham JJ. in *Penrhyn* v. *Licensed Victuallers' Mirror* (1),

(1) (1890) 7 Times L. R. 1.

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and must now be accepted as proper pleading. No difficulty, however, arises in the present case, because there was an order for particulars obtained by the plaintiffs in which it was stated that the defendant admitted that the defence was one of fair comment, and not of justification, and counsel argued this case upon the basis that there was no plea of justification.

Now, according to the ordinary practice, interrogatories to establish the truth of the alleged defamation are not admissible unless justification is set up by the defence. The question which we have to decide is whether these proposed interrogatories are admissible to establish (*a*) the facts alleged in the speech of the chairman; (*b*) the particulars delivered by the defendant of the fact, or facts, or materials referred to, disclosed, or proved, with reference to the plaintiffs, upon which the defendant alleges that his comments were based. The particulars deal with various subject-matters, and it may be that some interrogatories are admissible and some are not; I will deal with that later on. For the present it is sufficient to say that the matters relied on in the particulars of fair comment are (1.) reports of committees of magistrates; (2.) proceedings in licensing sessions, Courts of summary jurisdiction, the Court of Bankruptcy, and Chester quarter sessions; (3.) annual reports of police; (4.) the fact that a large number of licensees of the plaintiffs' houses in Liverpool are managers and not tenants. I may say in passing that, comparing the first three particulars with the fourth, the difference is obvious at once; as to the first three there is no mention whatsoever of those specified matters in the chairman's speech, but they are introduced because they are relied upon as grounds supporting the defence of fair comment. (5.) The provisions of s. 16, sub-s. 1, of the Licensing Act, 1902; (6.) the return of licensed houses in Crewe prepared by the clerk to the justices; (7.) the deaths of certain persons from delirium tremens or drink; (8.) the fact that certain people were destitute at the time of the publication of the defamation; (9.) certain convictions; (10.) a letter addressed by the secretary of the Crewe, Nantwich, and District Licensed Victuallers' Association to the chairman and members of the licensing Bench in the same district.

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The interrogatories deal with most of these subject-matters, asking, moreover, questions as to the occasion when the words were spoken by the defendant, and the capacity $\frac{\text{and}}{\text{or}}$ office in which he spoke them. It will be observed that although some of these interrogatories deal with specific statements of fact made by the defendant when he made the speech complained of, yet many of them refer to general statements made by the defendant in respect of the public-houses of the plaintiff company as a class, as illustrations of the state of things. The fact is that the defendant made general statements as to the character of the real occupation of these houses of the plaintiffs as disclosed in the antecedent proceedings before the magistrates, and proceeded to set forth a list of houses of the plaintiffs for which there were pending on that day applications for renewal of licences, and said that the applications would be adjourned, and that pending the adjournment the superintendent of police would be instructed to issue notices of objection based upon the specific objections which the magistrates thought necessary, having regard to the necessity for seeing whether or not the condition of the tenancy of such houses was such as to lead to such a conduct in the trade of these houses as was to the interest of the public; whereas the interrogatories are based not on this general statement about the houses of the plaintiff company, but on specific instances of the class of the complaint set forth in the defendant's speech, which instances, however, are not specifically alleged in the defendant's speech, but appear for the first time in the defendant's particulars of the facts and grounds upon which he bases his fair comment. The doubt is whether the defendant, not having pleaded justification, but only fair comment, can interrogate the plaintiffs as to these matters, or whether it would not be oppressive to throw this burden on the plaintiffs in a case where no plea of justification is relied upon. No one can doubt that the matter commented on by the defendant is a matter of public interest; but the onus of proving that his words are a comment, and that they are a comment on a matter of public interest, lies upon the defendant. The onus of proving that the comment is unfair or dishonest formerly used always to be held to lie on the plaintiff; that is to say, he had to establish that the facts were not such

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as to justify the defendant's comments, which were therefore malicious.

It has been said in recent cases that a comment cannot be a fair comment if it is based upon facts not truly stated. This appears strongly in the case of *Dakhyl* v. *Labouchere*. (1) Ever since *Merivale* v. *Carson* (2) the doctrine laid down by Sir James Shaw Willes (3) that fair comment is a branch of the doctrine of privileged occasion, under which the publication is protected if the judge rules that the occasion is privileged and that there is no evidence of express malice, has been disapproved, and the defence of fair comment has been regarded, as it is now regarded, as a denial that the words complained of are really defamatory, fair criticism being, it is said, no defamation. Opinions differ as to the merits of this change of doctrine. On the one hand it is said that under the privileged occasion doctrine the right of criticism is practically unlimited, however unfounded in fact or in style, unless malice is proved; on the other hand it is said that a doctrine which exposes the critic dealing with matters of public interest to a verdict against him unless he can vouch the truth in substance and in fact of every fact alleged by him in the criticism of the acts of any one acting in a matter of public interest is destructive of that freedom of criticism which is so essential for a free people. I think, however, that the modern doctrine must now be accepted as the doctrine in force, but even so it has been recognized until a few recent decisions that a defence of fair comment does not raise quite the same issues as a defence that the allegations complained of are true in substance and in fact. Cockburn C.J. said in *Campbell* v. *Spottiswoode* (4), which case seems to be the foundation of the modern doctrine, "One man has no right to impute to another, whose conduct may be fairly open to ridicule or disapprobation, base, sordid, and wicked motives, unless there is so much ground for the imputation that a jury shall find not only that he had an honest belief in the truth of his statements but that his belief was not without foundation." These are not words which a judge would

(1) [1908] 2 K. B. 325, n.
(2) (1887) 20 Q. B. D. 275.
(3) See *Henwood* v. *Harrison*, (1872) L. R. 7 C. P. 606.
(4) (1863) 3 B. & S. 769.

use in directing a jury on their duty in dealing with questions arising on a plea of justification.

In the case of *Digby* v. *Financial News* (1), which was a libel case in which the question was whether the plaintiff was entitled to particulars of the statements of fact which the defendants alleged to be true, and whether they alleged any of the statements in the plaintiff's documents to be untrue, Collins M.R. draws a distinction between a plea of justification and a plea of fair comment, and says that, when a justification is pleaded, it involves the justification of every injurious imputation which a jury may think is to be found in the alleged libel, but that fair comment does not purport to be a plea of justification, but a plea of fair comment; but he says further, "Comment, in order to be fair, must be based upon the facts, and if a defendant cannot shew that his comments contain no misstatements of fact, he cannot prove a defence of fair comment. . . . . If the defendant makes a misstatement of any of the facts upon which he comments, it at once negatives the possibility of the comment being fair. It is therefore a necessary part of a plea of fair comment to shew that there has been no misstatement of facts in the statement of the materials upon which the comment was based." In *Hunt* v. *Star Newspaper Co.*(2), which was subsequent in date to *Dakhyl* v. *Labouchere* (3), Cozens-Hardy M.R. says (4): "Now it seems to me that the learned judge did not properly direct the jury as to the meaning and effect of the plea of fair comment. The words which I have read seem to indicate that that cannot be fair comment which tends to prejudice or to impute blame to the plaintiff. In my opinion that is not the law. The defence of fair comment only arises in the event of the plea of justification failing, but the plea of justification may fail by reason of the facts stated not being substantially true. But there still remains the question whether, if, and only if, the facts are substantially true, the comment made by the defendants, based upon those true facts, was fair and such as might, in the opinion of the jury, be reasonably made. I cannot do better than adopt the language

(1) [1907] 1 K. B. 502.
(2) [1908] 2 K. B. 309.
(3) [1908] 2 K. B. 325, n.
(4) [1908] 2 K. B. at p. 317.

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of Kennedy J. in *Joynt* v. *Cycle Trade Publishing Co.* (1) 'The comment must . . . . not misstate facts, because a comment cannot be fair which is built upon facts which are not truly stated, and further, it must not convey imputations of an evil sort, except so far as the facts, truly stated, warrant the imputation.' And in *Dakhyl* v. *Labouchere* (2) Lord Atkinson said, 'A personal attack may form part of a fair comment upon given facts truly stated if it be warranted by those facts—in other words, in my view, if it be a reasonable inference from those facts. Whether the personal attack in any given case can reasonably be inferred from the truly stated facts upon which it purports to be a comment is a matter of law for the determination of the judge before whom the case is tried, but if he should rule that this inference is capable of being reasonably drawn, it is for the jury to determine whether in that particular case it ought to be drawn.'" And Fletcher Moulton L.J. says (3): "In order to give room for the plea of fair comment the facts must be truly stated. If the facts upon which the comment purports to be made do not exist the foundation of the plea fails. This has been so frequently laid down authoritatively that I do not need to dwell further upon it: see, for instance, the direction given by Kennedy J. to the jury in *Joynt* v. *Cycle Trade Publishing Co.* (4), which has been frequently approved of by the Courts."

Such being the state of the law, I come to the conclusion that the interrogatories on behalf of the defendant proposed for the examination of the plaintiffs cannot be wholly rejected. I assume that the defendant is entitled, as the law now stands, without a plea of justification, to ask the plaintiffs questions suggesting the truth of the allegations in the defendant's speech which the plaintiffs say were defamatory, or which the defendant desires to prove at the trial for the purpose of supporting his plea of absolute privilege. I have written out a list of the interrogatories which I think may be allowed, but I think it better that the parties should have an opportunity of agreeing, in view of our expression of opinion, which of the interrogatories are or

(1) [1904] 2 K. B. 292.
(2) [1908] 2 K. B. at p. 329.
(3) [1908] 2 K. B. at p. 320.
(4) [1904] 2 K. B. 292, at p. 294.

are not objectionable. The appeal therefore succeeds to this extent, that Bray J. held that none of these interrogatories were admissible, while we hold that some of them are admissible and ought to be answered.

BUCKLEY L.J. read the following judgment:—Where the defendant in an action for libel pleads by way of defence, first, justification, and, secondly, fair comment, he will fail upon his plea of justification unless he justifies every injurious imputation which the jury may think is to be found in the alleged libel. Assuming that he fails in that defence, then fair comment is a weapon which comes into action when justification has failed. The jury may, let us say, have found that the alleged libel imputed to the plaintiff that he, being returning officer at an election, was animated in that which he did by political bias, and may have found that the defendant has failed in justifying as true that the plaintiff was actuated by that improper motive. But the defendant may nevertheless succeed upon his defence of fair comment, if he shews that that imputation of political bias, although defamatory, and although not proved to have been founded in truth, yet was an imputation in a matter of public interest, made fairly and bona fide as the honest expression of the opinion which the defendant held upon the facts truly stated, and was in the opinion of the jury warranted by the facts, in the sense that a fair-minded man might upon those facts bona fide hold that opinion.

Upon the plea of fair comment the substratum must, I think, upon the authorities, be laid by shewing that, notwithstanding that the words are defamatory, yet the facts upon which the comment is based were truly stated, and that the comment was honest and was not without foundation. Fair comment does not negative defamation, but establishes a defence to any right of action founded on defamation. To succeed upon the plea of justification the defendant must prove not only that the facts were truly stated, but also that the innuendo is true. He must justify every injurious imputation. Upon fair comment, however, if it be established that the facts stated are true, the defence of fair comment will succeed even if the imputation or

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innuendo be not justified as true, but be fair and bona fide comment upon a matter of public interest. The plea of fair comment will succeed if, in the language of Cockburn C.J. in *Campbell* v. *Spottiswoode* (1), the defendant had an honest belief in the truth of his statements and his belief was not without foundation. The criticism must be "not only honest, but also well founded." For the proposition that fair comment must be based upon facts truly stated I refer, without reading them, to Lord Atkinson's judgment in *Dakhyl* v. *Labouchere* (2), to the judgments in *Hunt* v. *Star Newspaper Co.* (3), and to the language of Kennedy J. in *Joynt* v. *Cycle Trade Publishing Co.* (4), which was approved by the Court of Appeal in *Hunt* v. *Star Newspaper Co.* (3)

The case of *Digby* v. *Financial News* (5) has been referred to as if it contained something to the contrary of this proposition. It is a convenient illustration, I think, of what is meant by saying that the statements of fact upon which the comment is based must be true, for it is upon this point that, as I think, some confusion is to be found in the argument pressed upon us. In *Digby* v. *Financial News* (5) the plaintiff had, by his advertisement and by the reports and papers which he handed to Carruthers, made certain statements of fact. The defendants had summarized those documents. They were responsible for the truth or accuracy of those summaries as fairly representing the contents of the documents, but so far the defendants' truth and accuracy were not questioned. Founding themselves upon those statements, which formed the basis of their comment, they made certain comments said to be injurious. The plaintiff wanted to fasten upon the defendants an issue as to the truth or falsity of the statements which the plaintiff himself had made in his advertisement and in the reports which he sent. The defendants answered, and I see no reply to their answer, that they had never affirmed that those statements were either true or untrue, that their truth or untruth was not in issue between the parties at all, that the plaintiff, not the defendants, had

(1) 3 B. & S. 769.
(2) [1908] 2 K. B. at p. 329.
(3) [1908] 2 K. B. 309.
(4) [1904] 2 K. B. 292, at p. 294.
(5) [1907] 1 K. B. 502.

made those statements of fact, and that the defendants, assuming them to be true, had based upon them certain comments. Under these circumstances the truth or falsity of the plaintiff's statements was not in issue between them, and it was not for the plaintiff to prove their truth or their falsity. The statement of fact which the defendants made was that the plaintiff had asserted certain facts which in fact the plaintiff had asserted.

In the present case the defendant, upon an occasion which for this purpose is to be assumed to be not privileged, made certain statements of fact, and from these statements of fact drew certain inferences, and upon them made certain comments. To prove his defence of fair comment it is essential, as I understand the authorities, that, as pleaded in paragraph 8 of his amended defence, he should first shew that the statements of fact which he made were in their natural and ordinary signification true, and then that his comment upon them was fair and bona fide comment in a matter of public interest. From this it results that in my opinion all proper interrogatories addressed to the question whether the statements of fact in the chairman's speech are true or untrue are relevant, and that to that extent the interrogatories ought to be allowed.

KENNEDY L.J. read the following judgment:—In this case the question before the Court is as to the propriety of certain interrogatories which the defendant desires to administer to the plaintiffs, but which have been disallowed by the judge in chambers. His view appears to have been that, while some few of the proposed questions might rightly have been ordered to stand if they alone had been proposed, there was so much in the other interrogatories that was objectionable that the whole body ought to be disallowed. The principal object of these interrogatories is to procure admissions of fact. The need for such admissions arises out of the defence. The action is an action for slander, and the statement of defence includes a plea of fair comment. It is in my view abundantly clear that the alleged slander as set out in the statement of claim does contain several material averments of fact, and the plaintiffs, before it

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was sought by the defendant to administer these interrogatories, had obtained from the defendant, under a Master's order, particulars of the materials upon which the statements of the defendant, defended as being fair comment, were based.

Now it is true that there may be comment of an injurious nature in which there is no statement of fact, or which refers to facts which are admitted or are indisputable. In such a case the fairness of the comment depends upon the character of the criticisms, or the inferences of which it is composed, that is, whether it is a comment made honestly and bona fide, or a comment made mala fide and maliciously. It is such a position that Bramwell L.J. had in view when he said, in his judgment in *Purcell* v. *Sowler* (1), "If this had been a discussion on the plaintiff's conduct, the facts not being in controversy, the matter was a subject of such general public interest as would have given a right to comment upon it; and fair and bona fide comment would have been justified." But where the words which are alleged to be defamatory allege, or assume as true, facts concerning the plaintiff which the plaintiff denies, and which either involve a slanderous imputation in themselves, or upon which the comment bases imputations or inferences injurious to the plaintiff, it is, I think, settled law that the defence of fair comment fails, unless the comment is truthful in regard to its allegation or assumption of such facts. In *Merivale* v. *Carson* (2), a case of literary criticism of which the plaintiff complained as libellous, Bowen L.J. (3), in a passage of his judgment quoted by Collins M.R. in *McQuire* v. *Western Morning News Co.* (4), refers to "another class of cases in which, as it seems to me, the writer would be travelling out of the region of fair criticism—I mean if he imputes to the author that he has written something which in fact he has not written." And so in *Thomas* v. *Bradbury, Agnew & Co., Ld.* (5), also a case of literary criticism, Collins M.R., referring to the defence of fair comment, speaks of the right to comment, whether called privilege or by any other name, being limited to this extent,

(1) (1877) 2 C. P. D. 215, at p. 222.
(2) 20 Q. B. D. 275.
(3) 20 Q. B. D. at p. 284.
(4) [1903] 2 K. B. 100, at p. 110.
(5) [1906] 2 K. B. 627, at p. 638.

namely, it "does not extend to cover misstatements of fact however bona fide." And so, lastly, in the recent case in the Court of Appeal, *Hunt* v. *Star Newspaper Co.* (1), Cozens-Hardy M.R. said in the course of his judgment, "But there still remains the question whether, if, and only if, the facts are substantially true, the comment made by the defendants, based upon those true facts, was fair and such as might in the opinion of the jury be reasonably made." The Master of the Rolls then, after quoting with approval the language which I had used in summing up the case to the jury in *Joynt* v. *Cycle Trade Publishing Co.* (2), where I said, "The comment must . . . . not misstate facts, because a comment cannot be fair which is built upon facts which are not truly stated, and, further, it must not convey imputations of an evil sort, except so far as the facts, truly stated, warrant the imputation," proceeds to quote the judgment of Lord Atkinson in *Dakhyl* v. *Labouchere* (3): "A personal attack may form part of a fair comment upon given facts truly stated if it be warranted by those facts—in other words, in my view, if it be a reasonable inference from those facts." In the present case it is plain, as I have already observed, that the alleged slander does contain and involve averments of fact of a material character affecting the plaintiffs, and it appears to me that the defendant is well within established legal principle in asking by interrogatories for admissions as to those material facts, so far as they can fairly be treated as being within the plaintiffs' knowledge, information, and belief.

Appeal allowed in part.

On the following day counsel for the plaintiffs informed the Court that he was willing to answer all the interrogatories except Nos. 3, 4, 18, 24, and 25, and this offer was accepted by counsel for the defendant.

Solicitor for plaintiffs: *John Hands, for Berry & Co., Liverpool.*
Solicitors for defendant: *E. W. & Bruce Beal, for C. E. Speakman, Crewe.*

(1) [1908] 2 K. B. 309, at p. 317. (2) [1904] 2 K. B. 292.
(3) [1908] 2 K. B. at p. 329.

W. J. B.

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Nov. 18.

THE KING *v.* BAINES AND ANOTHER.

Criminal Law — Practice — Evidence — Subpœna — Setting aside — Inherent Jurisdiction of Court—Subpœna not issued for Purpose of obtaining relevant Evidence.

The King's Bench Division of the High Court of Justice has jurisdiction to set aside a subpœna issued in a criminal proceeding.

A witness served with a subpœna cannot get it set aside by merely swearing that he can give no material evidence. But the Court, being satisfied that writs of subpœna ad testificandum had been issued not bona fide for the purpose of obtaining relevant evidence and that the witnesses named in them were in fact unable to give relevant evidence, set the subpœnas aside.

Where a subpœna is set aside the power of the judge at the trial to order the witnesses to attend, if he thinks their presence necessary, is in no way interfered with.

RULE nisi calling upon the defendants, Jennie Baines and Alfred Kitson, to shew cause why certain subpœnas issued on behalf of the defendants commanding the applicants, the Right Honourable Herbert Henry Asquith and the Right Honourable Herbert John Gladstone, to appear and testify at the assizes being held at Leeds upon the trial of an indictment against the defendants for breach of the peace and unlawful assembly should not be set aside on the ground that the issue of such writs was an abuse of the process of the Court.

The applicants were the Prime Minister and the Home Secretary respectively, and on November 4, 1908, were served with the writs of subpœna commanding them to appear and testify at the assizes then being held at Leeds upon the trial of an indictment against the defendants for breach of the peace and unlawful assembly. The subpœnas were issued upon the application of the solicitor for the defendants.

The facts were shortly as follows: On October 10, 1908, the applicants were present at a meeting held in the Coliseum, a hall in Leeds. They were seated on the front of a platform and were about sixty feet away from closed doors forming the entrance from a street called Cookridge Street into the hall. The doors had glass panels in them. The charge

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against the defendants was that they with other persons unlawfully assembled in Cookridge Street and there committed other like offences during the meeting, and the defendants suggested that the applicants saw from the position which they occupied on the platform what was going on in Cookridge Street, and that they must have heard what was said in the street.

Each applicant made an affidavit, which, so far as material, was as follows:—

"I am wholly unable to give any evidence which can possibly be relevant to any issue which can arise upon the trial of the defendants, and I have so informed the solicitor for the defendants. The offences charged in the indictment relate to matters alleged to have taken place in a certain street in Leeds at a time when I was in a building known as the Coliseum in that town. No application has been made to me by or on behalf of the defendants or their solicitor for any proof of any evidence to be given by me.

"For a long time past the defendants and others associated with them have been carrying on a public agitation in favour of the extension of the parliamentary suffrage to women, in the course of which agitation the defendants and their associates have adopted many means of attracting attention to the movement in question and of obtaining notoriety. One of such means has been to subject myself and others, ministers of the Crown, to personal annoyance in public places and to interrupt the performance of our public duties. I verily believe that the writ of subpœna has been served upon me not in any bona fide belief, however mistaken, that my evidence is material for any purposes of justice, but for the purposes of vexation and to bring the defendants and their agitation into further notoriety.

"My attendance at the assizes would involve a serious interruption of the performance of my public duties as a minister of the Crown."

From the correspondence it appeared that each applicant wrote to the solicitor for the defendant Baines saying that he did not see anything from the platform of the Coliseum at Leeds which would enable him to give relevant evidence at the trial of the defendants, and that he saw nothing of what went on outside

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the Coliseum and could give no evidence in any way material to the case.

Pethick Lawrence, for the defendant Baines, shewed cause. There is no precedent in existence in support of the rule. There is no authority for setting aside a subpœna issued in a criminal matter. It cannot be said that the subpœnas were applied for on grounds which are frivolous. The attendance of the applicants at the trial will be necessary.

By means of this application the Crown is in effect asking the defendants to forego part of their evidence, for in employing the Treasury solicitor they have employed the agent of the Crown. The application to set aside the subpœnas is therefore bad in form. Further, the application is an attempt to compel the defendants to disclose their evidence before the trial. It must necessarily prejudice the defence.

The evidence of the applicants is material. The applicants could see through the panels of the doors into Cookridge street, and what they saw and heard or did not see or hear is of importance and valuable to the defendants in the conduct of their defence. The applicants are not yet in a position to judge as to what evidence is relevant.

E. G. Palmer, for the defendant Kitson, who had taken no part in applying for the subpœnas, submitted to the judgment of the Court.

Sir William S. Robson, A.-G., Sir Samuel T. Evans, S.-G., and *S. A. T. Rowlatt*, in support of the rule. It is clear on the facts that the applicants saw nothing that can be relevant or material. A subpœna has been set aside in a civil proceeding: *Steele* v. *Savory* (1); *In re Mundell.* (2) As to this matter there is no distinction in principle between civil and criminal proceedings. It is true that there is no authority for setting aside a subpœna in criminal proceedings, but the explanation probably is that it is very rarely that the process of the Court is abused, it being well understood that the Court has power to protect itself. Other evidence is available to the defendants of persons who had a view of Cookridge Street and saw what was going on. No

(1) [1891] W. N. 195. (2) (1883) 48 L. T. 776.

evidence the applicants can give can in any conceivable way assist the defendants.

BIGHAM J. I am of opinion that this rule must be made absolute. There can be no doubt as to the jurisdiction of the Court to interfere where it is satisfied that its process is being used for indirect or improper objects. It must not be supposed that the position which the applicants occupy affords them any privilege. They stand in the same position as any other of His Majesty's subjects. But the Court has to inquire whether its process has been issued against them with the object and expectation on reasonable grounds of obtaining from them evidence which can be relevant. What are the facts? The applicants appear to have been present at a meeting in a hall in Leeds. They were seated on the front of a platform and were about sixty feet away from closed doors forming the entrance from the street into the hall. We have had the doors described to us as having glass panels in them. The charge is that the respondents unlawfully assembled and committed a breach of the peace in the street during the meeting, and it is suggested that these two gentlemen saw from the position which they occupied on the platform what was going on in the street, and that they must have heard what was said in the street, and that therefore their evidence is material. I do not believe, as a matter of fact, that they saw or could have seen or that they heard or could have heard anything that can be material to the inquiry at Leeds. We have before us the affidavits of the applicants, in which they both swear that they are wholly unable to give any evidence which can possibly be relevant to any issue which may arise. I believe that to be true. Therefore it would be an idle waste of time and money to require them to go down to Leeds to give evidence. The applicants further say that no application has been made to them by the defendants for any proof of the evidence to be given by them. That statement satisfies me that this process has not been issued for the simple and proper purpose of obtaining evidence, but for a different and ulterior purpose, a purpose to which the process of this Court ought not to be applied. It is sufficient to say, first, that I am satisfied that neither of the

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applicants can give relevant evidence; and, secondly, that the process of the Court has not been issued for the purpose of obtaining relevant evidence, but for other reasons.

WALTON J. I agree. There is no doubt that this Court has jurisdiction to entertain this application. There is no distinction on this point between civil and criminal proceedings. The old Queen's Bench had ample jurisdiction over all criminal proceedings. This case must not be taken as a precedent establishing any rule that a person can, by swearing that he can give no relevant evidence, get a subpœna set aside. Ministers of the Crown have no special privilege. But these subpœnas are not bona fide required for the purpose of obtaining any evidence that can be relevant. Our decision in no way interferes with the power of the judge at the trial, if anything arises which leads him to think that the attendance of these gentlemen is necessary —although it is difficult to see how anything can arise to induce him to think so—to make an order for them to attend.

Rule absolute.

Solicitor for applicants: *The Treasury Solicitor.*
Solicitor for defendant Baines: *W. Dodgson, Leeds.*
Solicitors for defendant Kitson: *Lawrence Jones & Co.*

J. E. A.

HANRAHAN *v.* LEIGH-ON-SEA URBAN DISTRICT COUNCIL.

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Dec. 10.

Local Government—Building—Conversion of Building into Dwelling-house—"New Building"—Breach of By-law—Right to remove, alter, or pull down Building—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 157, 159.

By s. 157 of the Public Health Act, 1875, every urban authority may make by-laws with respect to (inter alia) the structure of new buildings, and may further provide for the observance of such by-laws by enacting therein such provisions as they think necessary as to the power of such authority to remove, alter, or pull down any work begun or done in contravention of the by-laws. By s. 159, "For the purposes of this Act . . . . the conversion into a dwelling-house of any building not originally constructed for human habitation, or the conversion into more than one dwelling-house of a building originally constructed as one dwelling-house only, shall be considered the erection of a new building."

By-law 102 of the by-laws made by an urban council provided that "if any work to which any of the by-laws relating to new streets and buildings may apply be begun or done in contravention of any such by-law, the person by whom such work shall be so begun or done, by a notice in writing . . . . shall be required . . . . to shew sufficient cause why such work shall not be removed, altered, or pulled down. If such person shall fail to shew sufficient cause . . . . the council shall be empowered, subject to any statutory provision in that behalf, to remove, alter, or pull down such work."

The owner of a building, which was not originally constructed for human habitation, converted it by structural alterations into a dwelling-house. The building did not comply with the by-laws relating to new buildings made by the urban council of the district within which the building was situated. The urban council, after due notice to the owner, pulled down the whole building:—

Held, that the whole building when so converted became, by virtue of s. 159 of the Public Health Act, 1875, a new building subject to the by-laws relating thereto, and as it did not comply with the requirements of those by-laws the urban council had power to pull down the whole building, and not merely the actual work of conversion.

Appeal from the county court of Essex holden at Southend.

The action was brought to recover damages for trespass and conversion. The plaintiff in August, 1907, purchased a plot of land within the district of the defendant council. At that date there was upon the land a third-class railway carriage, which the vendor had bought from the Great Eastern Railway Company so

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as to afford a place where his workmen could have their dinner. There was no house upon the land. There was a partition inside the carriage which extended up to the roof, and the plaintiff made an opening in the partition for the purpose of giving access from one part of the carriage to the other. He removed the seats from the carriage and put in a stove and a chimney, and he put bedding and furniture into the carriage. He lived in it with his wife and children. He also erected a shed upon the land with an earth closet in it. In January, 1908, the plaintiff was summoned before justices, upon the complaint of the defendant council, for having erected a building without having previously given notice of his intention to do so and without having deposited plans thereof as required by by-law 95 of the by-laws made by the defendant council, and he was fined 6*s*. On March 7, 1908, the defendants, through their clerk, served notice on the plaintiff, stating that he had committed an offence against by-law 10 (1) of the defendants' by-laws by having done certain work, namely, erected or caused to be erected a new building in contravention of the by-law, and requiring him to attend, either personally or by an authorized agent, before the defendant council on March 11 and to shew sufficient cause why such work should not be removed, altered, or pulled down; and the notice further stated that if he failed to shew sufficient cause the defendants would remove, alter, or pull down such work. The plaintiff attended before the council, and in the opinion of the council failed to shew sufficient cause why the work should not be removed, altered, or pulled down, and accordingly on March 23 the clerk of the defendant council,

(1) By-laws 9—52, both inclusive, were headed "With respect to the structure of walls, foundations, roofs, and chimneys of new buildings for securing stability and the prevention of fires, and for the purposes of health." By by-law 10, "Every person who shall erect a new building shall, except in such cases as are hereinafter specified, cause such building to be enclosed with walls constructed of good bricks, stone, or other hard and incombustible materials properly bonded and solidly put together." The excepted cases were new buildings intended for use as dwelling-houses not less than fifteen feet from an adjoining building, where timber framing properly put together, with the spaces between the timbers filled in completely with brickwork, might be used.

acting in pursuance of a resolution of the council, gave the plaintiff notice that at the expiration of seven days the council would, unless the work was sooner pulled down, proceed to pull down such work. After the expiration of the notice the defendants by their workmen entered upon the land and completely pulled down the carriage and took the materials away to their yard. The plaintiff thereupon brought an action in the county court at Southend, claiming damages from the defendants for trespass in entering upon his land and pulling down the carriage, and for conversion of the materials in removing them to and detaining them at the defendants' yard. The county court judge, who tried the action with a jury, held upon the claim for trespass that the defendants were justified in pulling down the carriage, and he directed judgment to be entered for them upon that claim; and upon the claim for conversion he left the case to the jury, who found for the plaintiff for 5*l.* damages. The defendants having paid 5*l.* 10*s.* into Court, the judge entered judgment for the defendants. (1)

The plaintiff appealed.

(1) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 157, gives power to an urban authority to make by-laws "(2.) with respect to the structure of walls, foundations, roofs, and chimneys of new buildings for securing stability and the prevention of fires and for purposes of health," and to provide for the observance of such by-laws by enacting therein such provisions as they think necessary as to the power of such authority (subject to the provisions of the Act) to remove, alter, or pull down any work begun or done in contravention of such by-laws.

Sect. 159: "For the purposes of this Act the re-erecting of any building pulled down to or below the ground floor, or of any frame building of which only the framework is left down to the ground floor, or the conversion into a dwelling-house of any building not originally constructed for human habitation, or the conversion into more than one dwelling-house of a building originally constructed as one dwelling-house only, shall be considered the erection of a new building."

By-law 102 of the by-laws made by the defendant council: "If any work to which any of the by-laws relating to new streets and buildings may apply be begun or done in contravention of any such by-law, the person by whom such work shall be so begun or done, by a notice in writing, which shall be signed by the clerk to the council and shall be duly served upon or delivered to such person . . . . shall be required on such day and at such time and place as shall be specified in such notice to attend personally or by an agent duly authorized in that behalf before the council and shew sufficient cause why such work shall not be

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Dec. 9. *F. R. Y. Radcliffe, K.C.*, and *Thornton Lawes*, for the plaintiff. The county court judge was wrong in holding that the act of the defendants in pulling down the railway carriage (1) was justified. The defendants had only power to remove, alter, or pull down the work actually done by the plaintiff in converting the railway carriage into a dwelling-house. Sect. 157 of the Public Health Act, 1875, gives power to an urban authority to make by-laws with respect to the structure of new buildings, and to make provision therein for the removal, alteration, or pulling down of any work begun or done in contravention of such by-laws. By-law 102 of the by-laws made by the defendants under the provisions of that section provides that if any work to which any of the by-laws relating to new streets and buildings apply be begun or done in contravention of any such by-law, the urban authority, after giving notice to the person who shall have begun or done such work, may "remove, alter, or pull down such work." "Such work" means the work begun or done in contravention of a by-law. By-law 102 only gives power to remove, alter, or pull down the actual work done in contravention of a by-law, and not the whole building. Sect. 159, which is relied upon by the defendants, is not against this view. That section, which says that "for the purposes of this Act" the conversion into a dwelling-house of a building not originally constructed for human habitation is to be considered as the erection of a new building, means that the structural work of conversion actually done in so converting a building is to be considered as if such work were the erection of a new building for the purpose of compliance with the Act and the by-laws made under the Act. For instance, before the structural work of conversion is begun, plans of the proposed work must be sent to the urban council as required by by-law 95, and the work must be carried out in accordance with the by-laws. Under s. 159 the work of

removed, altered, or pulled down. If such person shall fail to shew sufficient cause why such work shall not be removed, altered, or pulled down, the council shall be empowered, subject to any statutory provision in that behalf, to remove, alter, or pull down such work."

(1) It was not contended that the railway carriage was not a "building" within the meaning of the Act and by-laws.

conversion is not treated as if it were the erection of the whole building as a new building, so as to give the urban authority power to pull down the whole building if the work begun or done in the process of conversion does not comply with some by-law. Sect. 158 supports this contention, because it provides that if work is begun after notice of the disapproval of the plans by the urban authority, and is not in conformity with any by-law, the urban authority may cause "so much of the work as has been executed to be pulled down or removed." That shews that the intention of the Act is to give the urban authority power to remove, alter, or pull down only the actual work begun or done in contravention of a by-law. It may be that, if the work of conversion is so interwoven with the old building that it is impossible to remove or pull down the work of conversion without pulling down the whole building, the urban council may have power to do so. But that is not the case here. The defendants, therefore, at the most had only power to remove, alter, or pull down the work which the plaintiff had done, namely, to close the opening in the partition and to remove the stove, and also to remove the structure and earth closet erected on the land. If the conversion of a building into a dwelling-house is under s. 159 to be considered as the erection of the whole building as a new building, great hardship may very possibly arise. The mere beginning of the work of conversion would in that event give the urban authority power to pull down the whole building, and to do so without any order of a judicial authority. Again, under s. 159 the conversion into more than one dwelling-house of a building originally constructed as one dwelling-house only is to be considered as the erection of a new building. In such a case, if the contention on behalf of the defendants is correct, the mere fact that the owner of the building has begun to brick up a doorway for the purpose of closing the communication will entitle the urban authority to pull down, not only the brickwork actually begun, but the whole building. The Legislature never could have intended to give so drastic a remedy to an urban council. When there is another construction which can reasonably be placed upon s. 159 and which will avoid any such possible hardship, the Court will place that construction upon the section. The

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defendants were therefore not justified in pulling down the whole carriage, and by doing so committed a trespass. The county court judge having withdrawn the claim for trespass from the jury, there ought to be a new trial.

C. Herbert Smith, for the defendants. As soon as the plaintiff converted the railway carriage into a dwelling-house he must be considered, by reason of s. 159 of the Public Health Act, 1875, as having erected a new building. It was the same as if the plaintiff had erected the whole of the building and that whole building so converted became a new building. That building was erected in contravention of by-law 10, and thereupon the defendants as the urban council had power, after giving the plaintiff notice and allowing him an opportunity of shewing cause why the work should not be removed, altered, or pulled down, to remove, alter, or pull it down. The "work done" within the meaning of s. 157 of the Act and by-law 102 was made by s. 159 the erection of a new building, namely, the erection of the dwelling-house as a whole, and as that building was erected in contravention of by-law 10, the defendants had power to pull it down. No hardship can result from this construction of the Act. The act of an urban authority in deciding whether a building shall be pulled down is a judicial act, and the owner must be given an opportunity of shewing cause why the building should not be pulled down: *Hopkins* v. *Smethwick Local Board of Health* (1); and by-law 102 in the present case provides for due notice to be given to the person who does the work. The plaintiff here had full notice and was heard in support of his case. By-law 102, which gives power to the urban council to pull down work done in contravention of a by-law, is not ultra vires: *Fairbrass* v. *Mayor of Canterbury*. (2) The decision of the county court judge was therefore right.

Dec. 10. WALTON J. I have been asked by my brother Bigham to deliver judgment first. This is an appeal from the judgment of the judge sitting at the Southend county court in which he held that the defendants were justified in pulling down a certain building which was in the occupation of the

(1) (1890) 24 Q. B. D. 712. (2) (1902) 67 J. P. 181.

plaintiff. The claim of the plaintiff, so far as material to this appeal, was for damages for a tort which he alleged that the defendants had committed in pulling down his building. The building in question was an old railway carriage which had been brought on to the land by the former owner thereof, who was the vendor to the plaintiff, and which had been used by him as a place where his workmen might take their dinners. It had not been constructed for nor used as a dwelling-house. The plaintiff made certain alterations in this building, as I shall call it, by which he converted it into a dwelling-house. I may mention, though it does not seem to me to be relevant to the question now before us, that the plaintiff did this without submitting plans to the urban council as is required by the by-laws in the case of the erection of a building, and for this the urban council took proceedings against him before the magistrates, and he was fined.

The contention of the urban council is that this building so converted into a dwelling-house was a new building within the meaning of s. 159 of the Public Health Act, 1875, and the council's by-laws, which were made under s. 157, sub-s. 2, of the Act. The by-laws relating to new buildings are headed "With respect to the structure of walls, foundations, roofs, and chimneys of new buildings for securing stability and the prevention of fires, and for the purposes of health," following in this respect the wording of s. 157, sub-s. 2, of the Act. One of those by-laws is by-law 10, which provides that every person who shall erect a new building shall cause the building to be enclosed with walls constructed of bricks, stone, or other hard and incombustible materials solidly put together, or, in certain cases, of timber framing, the spaces between the timber framing being filled in with brickwork. The urban council contend that this is a "new building," that the by-law applies to it, and that it has been erected in contravention of the by-law. If they are right in that, it seems to follow that by-law 102 becomes applicable. That by-law provides that "if any work to which any of the by-laws relating to new streets and buildings may apply be begun or done in contravention of any such by-law, the person by whom such work shall be so begun or done . . . . shall be

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required . . . . to shew sufficient cause why such work shall not be removed, altered, or pulled down. If such person shall fail to shew sufficient cause why such work shall not be removed, altered, or pulled down, the council shall be empowered, subject to any statutory provision in that behalf, to remove, alter, or pull down such work." The defendants, alleging that this was a new building erected in contravention of by-law 10, served notice upon the plaintiff requiring him to shew cause why the work should not be removed, altered, or pulled down. The defendants, after hearing the plaintiff, resolved that the building should be pulled down, and served notice thereof upon him, and, acting under the last clause in by-law 102, they proceeded to pull down the building. They did not merely remove or pull down the work which the plaintiff had done for the purpose of converting the building into a dwelling-house, but they pulled down the whole building. The county court judge has held that they were entitled to do so.

It is contended on behalf of the plaintiff that upon the true construction of by-law 102 and s. 157 of the Act, under which the by-law was made, the defendants, though they had power to remove, alter, or pull down the actual work which had been done by him in converting the building into a dwelling-house, had no power to pull down the whole building, including that part which had not been touched or altered in any way by the plaintiff. That is the question which we have to determine, and, though it arises in a case where the value of the building is comparatively trifling, it is plain that the decision, whichever way it may be, will be far-reaching.

I was myself somewhat startled by the extraordinary consequences which, it was suggested to us, might result if we were to hold that an urban authority has power, where a building has been converted by, it may be, a comparatively slight alteration into a dwelling-house, the work having been done in contravention of a by-law, to pull down the whole building. It is obvious that that is a very large power for urban authorities to possess. A costly building which was not originally constructed as a dwelling-house, might by a slight alteration be converted into a dwelling-house and if the work was done in contravention of a

by-law, even though it was only begun, the urban authority might have power under the by-law to pull the whole building down. Undoubtedly the construction which the county court judge has placed upon this by-law may give powers which are very extensive and which may be liable to abuse. However, in construing by-laws of this kind one must remember the principle stated by Bramwell L.J. in *Baker* v. *Mayor, &c., of Portsmouth* (1), where he said: "No doubt great power is given to sanitary authorities, the Legislature thinking that it was tolerably certain that they would use those powers with discretion, and not tyrannically. We must therefore construe those sections and by-laws without regard to consequences." It may be that we have to construe the Act and the by-laws in such a way as to give to local authorities very extensive powers, which are capable of being exercised unreasonably; but, as Bramwell L.J. said, we must construe them according to their plain and reasonable meaning without regard to consequences, the Legislature having assumed that local authorities would act in a reasonable and not in a tyrannical manner.

Now this case depends mainly upon the true construction of s. 159 of the Public Health Act, 1875. I do not think that it is necessary to refer to s. 158. The by-laws were made under s. 157, but for the purposes of this case s. 159 is the important section. It runs thus: "For the purposes of this Act the re-erecting of any building pulled down to or below the ground floor, or of any frame building of which only the framework is left down to the ground floor, or the conversion into a dwelling-house of any building not originally constructed for human habitation, or the conversion into more than one dwelling-house of a building originally constructed as one dwelling-house only, shall be considered the erection of a new building." Under that section the re-erection of a building under certain conditions is to be treated as the erection of a new building, and the conversion—meaning, no doubt, conversion by some structural work and not by mere user—into a dwelling-house of a building not originally constructed for human habitation is also to be considered as the erection of a new building. It is said,

(1) (1878) 3 Ex. D. 157.

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however, that, though that is so, by-law 102 only gives power to the urban authority, where work is begun or done in contravention of a by-law, to remove, alter, or pull down "such work"—that is, the work so begun or done—and that, therefore, though the conversion of the building in this case into a dwelling-house is under s. 159 to be considered as the erection of a new building, still the by-law only gives power to remove, alter, or pull down the actual work done by the plaintiff in the process of conversion. I have felt considerable difficulty upon this question. However, after careful consideration it seems to me that the true effect of s. 159 is this: if work is done upon a building not originally constructed for human habitation for the purpose of converting it into a dwelling-house, that is deemed to be the erection of a new building. It follows that the building which is converted must be deemed to be, and therefore becomes for the purposes of the Act, a new building, and the work of conversion is to be deemed to be the erection, by the person converting it, of that new building. In other words, it seems to me that the intention is that where an old building, not originally constructed for human habitation, is altered by some structural alteration and converted into a dwelling-house, it is as if the person who makes the alteration has built a new dwelling-house, using for the purpose the old materials, that is, the existing building, as well as some new materials, and the building so altered is to be treated as a new building, namely, a newly erected dwelling-house.

Now the necessary effect of that is, in the first place, leaving out of consideration for the moment the power to alter, pull down, or remove the work, that the building which is made a new building by s. 159 becomes subject to the by-laws which are described as being by-laws "with respect to the structure of walls, foundations, roofs, and chimneys of new buildings for securing stability and the prevention of fires, and for the purposes of health." To take an illustration, suppose that the plaintiff, before doing the alterations, had sent to the urban council plans of the proposed alterations as required by the by-laws. It seems to me to be plain that the urban council could have treated the building as a whole, and could have said

that they would not approve of the plans because the building as a whole, and not the mere work done in altering it, did not comply with the by-laws. The by-laws relating to new buildings refer to the buildings as a whole, and the effect of s. 159 is, as it seems to me, to make the whole building so converted a new building for the purposes of the Act, and the work of alteration the erection of that new building as a whole, and its effect is not confined to making the work of alteration actually done a new building. It seems to me that it necessarily follows that there was in this case a breach of by-law 10 by reason of the building as a whole, and not merely the alterations, not complying with the requirements of that by-law. If that is so, the remedy is given by by-law 102, which confers power on the urban council in the case of any work done in contravention of any of the by-laws—and in this case, by virtue of s. 159, the work so done is to be treated as the work of erecting the whole building—to remove, alter, or pull down that work.

Cases have been suggested in which the exercise of this power may be tyrannical and unreasonable, but it must be remembered that before the power can be exercised notice must be given to the person who has done the work, so as to give him an opportunity either of appearing before the council or of laying his case before them and stating why the power should not be exercised, and if he can shew that by some alteration he can make the building comply with the by-laws, it is scarcely conceivable that the council will not be satisfied with that. The pulling down is a remedy given only in extreme cases, and therefore I do not attach a great deal of importance to the suggestion that this construction of the Act and the by-laws may be productive of great hardship. At any rate, even if it may lead to cases of hardship, we must construe the Act and the by-laws in their natural sense, and, as Bramwell L.J. says in *Baker* v. *Mayor, &c., of Portsmouth* (1), without regard to consequences. In my opinion the appeal must be dismissed.

BIGHAM J. I agree, and have very little to add. In my opinion the Legislature intended that when a building which

(1) 3 Ex. D. 157.

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was not meant for a dwelling-house is altered so as to make it a dwelling-house, the building so converted is to be treated for the purposes of the Public Health Act, 1875, as if it were a new building. That is the effect of s. 159. The building then becomes subject to all the provisions of the Act, and of the by-laws made in pursuance of the Act, with regard to new buildings. That being the view I take of this legislation, the railway carriage in this case became a new building. As such it did not comply with the requirements of the by-laws of the urban council, and the council therefore became entitled to pull the whole building down.

Appeal dismissed.

Solicitor for plaintiff: *C. T. Wilkinson.*
Solicitors for defendants: *Lees & Co.*

W. F. B.

K. B. D.
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Nov. 5.
C. A.
1908
Dec. 4, 5, 7.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

THE KING (ON THE PROSECUTION OF THE SOUTH EASTERN AND CHATHAM RAILWAY COMPANIES' MANAGING COMMITTEE) *v.* ASSESSMENT COMMITTEE OF THE BOROUGH OF SOUTHWARK.

Poor Rate—Metropolis—Railway Company—Quinquennial Valuation—Provisional List—Reduction of Value of Railway through Competition of Tramways and Tube Railways—"Any Cause"—Mandamus to Assessment Committee to appoint Valuer—Valuation (Metropolis) Act, 1869 (32 & 33 *Vict. c.* 67), *s.* 47.

Where competition by tramways, tube railways, and lines of motor omnibuses, all of which were in existence at the time when the last quinquennial valuation list for a metropolitan parish was made, has, in subsequent years of the quinquennial period, caused a large and continuous decrease of the receipts of a railway company in respect of local passenger traffic over a portion of their line situated in the parish, whereby the rateable value of that portion of their line has been reduced, s. 47 of the Valuation (Metropolis) Act, 1869, is applicable, and if, upon a requisition by the company, the overseers make default in sending a provisional list to the assessment committee in pursuance

of sub.-s. 1 of the before-mentioned section, it becomes the duty of the assessment committee under sub-s. 2 of the section to appoint a valuer to make such a list.

ORDER nisi to the assessment committee appointed by the mayor, aldermen, and councillors of the metropolitan borough of Southwark to shew cause why a writ of mandamus should not issue commanding them to appoint a person to make a provisional list for the parish of St. Mary, Newington, in the said borough, containing the gross and rateable values of the lines of railway and appurtenances whereof the South Eastern and Chatham Railway Companies' managing committee were the occupiers, as reduced since the making of the valuation list then in force, as required by the Valuation (Metropolis) Act, 1869, s. 47, sub-s. 2. Two other orders nisi to the same effect were obtained in respect of the parishes of St. Saviour and Christchurch in the said borough.

The following affidavit made by Sidney Edward Hitchcock was filed in support of the orders :—

1. I am the rating agent of the South Eastern and Chatham Railway Companies' managing committee.

2. The said committee are occupiers of lines of railway and appurtenances in the parishes of St. Mary, Newington, St. Saviour, and Christchurch, all in the metropolitan borough of Southwark, in the county of London.

3. In the quinquennial valuation lists for the said parishes made in the year 1905 the said property was assessed in the following sums as the gross value and as the rateable value thereof respectively :—

	Gross Value.	Rateable Value.
Parish of St. Mary, Newington .	19,950*l.*	15,000*l.*
Parish of St. Saviour . . .	14,000*l.*	11,500*l.*
Parish of Christchurch . . .	31,200*l.*	25,000*l.*

4. The said lines of railway are to a great extent used for the purpose of local passenger traffic, the journeys of the great majority of passengers beginning and ending at points within the metropolis or its suburbs.

5. In the last few years the facilities for passenger locomotion in the districts in which such passenger traffic arises have been

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largely increased by the opening of underground electric railways, by the development of electric tramways, and the opening of new electric tramway lines, and by the establishment of lines of motor omnibuses.

6. In consequence of the establishment of new facilities for passenger traffic hereinbefore described, which are in direct competition with the said lines of railway belonging to the said committee, there has been a continuous fall in the receipts derived by the said committee from the occupation of the said lines of railway, and there has in particular been a considerable fall in the receipts earned upon the said lines of railway in the course of the year beginning April 6, 1907.

7. By reason of the diminution of the business done by the committee upon the said lines of railway the said lines of railway have been considerably reduced in value.

8. The mayor, aldermen, and councillors of the said metropolitan borough of Southwark are the overseers of the respective parishes by virtue of the London Government Act, 1899.

9. On March 26, 1908, I wrote three letters to Mr. J. A. Johnson, the town clerk of the said borough, in which I made application on behalf of the said managing committee for the insertion of the said lines of railway in a provisional valuation list in each of the respective parishes. [The letters stated that an alteration had taken place in the value of the hereditament in question within the meaning of s. 47 of the Valuation (Metropolis) Act, 1869, whereby the gross and rateable values were reduced owing to specific causes, namely, tramway, tube railway, and motor omnibus competition; that since the year 1904, the year upon which the quinquennial valuation list was based, there had been a large falling off of local traffics year by year, which was still continuing, between all stations where the traffic had been tapped by the competition above referred to; for example between London (Charing Cross, Waterloo Junction, Cannon Street, and London Bridge) and thirteen stations in the suburban area the number of bookings had declined from 9,000,000 in 1904 to 7,700,000 in 1907, exclusive of season tickets and of losses between London Bridge and the City and Charing Cross; and also between the City (Ludgate Hill, Holborn Viaduct, &c.) and about

twenty-five suburban stations there had been a decline of two-and-a-half millions of bookings, exclusive of season tickets.]

10. On March 26, 1908, I also sent to Mr. J. A. Johnson in his capacity of clerk to the assessment committee for the said borough copies of the said letters in compliance with s. 47, sub-s. 2, of the Valuation (Metropolis) Act, 1869.

11. The said mayor, aldermen, and councillors, through their rating committee, declined to accede to my applications for the insertion of the said lines of railway in provisional valuation lists for the said respective parishes. Such decision was communicated to me verbally on inquiry at the town hall, Walworth Road, on May 15, 1908.

12. The said assessment committee also declined to insert the said lines of railway in provisional valuation lists for the said respective parishes. Such decision was communicated to me in a letter from Mr. J. A. Johnson dated May 21, 1908. [In that letter it was stated that the assessment committee had that day under consideration the letters of March 26 asking that the assessments in the said parishes might be inserted in a provisional valuation list; and that, after carefully considering the statements in the letters and at an interview between the rating agent, the town clerk, and the assistant town clerk, "the committee were of opinion that no change has taken place within the meaning of s. 47 of the Valuation (Metropolis) Act, 1869, during the last assessment year, and under these circumstances they felt they would not be justified, having regard to the decided cases, in directing the properties of your company in the various parishes to be inserted in a provisional valuation list."]

13. I am advised and verily believe that, in view of the reduction in the value of the said lines of railway due to the diminution of the business done thereon, and shewn by the continuous fall in the receipts earned by the occupation thereof, the said committee are entitled to have the said lines of railway inserted in provisional valuation lists for the said respective parishes.

An affidavit made by William Waller Renwick, the auditor in the audit department of the South Eastern and Chatham Railway Companies' managing committee, was also filed in

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support of the orders, in which he stated that a considerable portion of the traffic carried over the lines of railway in the three parishes consisted of local passenger traffic, the passengers travelling between various stations in London, or between London stations and stations in the suburbs of London, and the great majority of such passengers travelling daily between the same two points; that he had prepared from the railway books tables shewing the receipts from passenger traffic of various kinds and the numbers of passengers carried between various stations of the managing committee in London and the suburbs for the years 1904, 1905, 1906, and 1907, all such receipts having been earned in respect of traffic carried over, and all the passengers having been carried over, the lines in one or all of the three parishes; that the figures so extracted from the books shewed a continuous and considerable diminution in the amount of the business done upon the lines of railway in the three parishes; that the amount of receipts earned and the number of passengers carried upon the lines of railway in the last calendar month (June, 1908) and the previous months of the year 1908 shewed a continuous decrease; and that "in these circumstances I am advised and verily believe that the said lines of railway have been considerably reduced in value by reason of the competition of electric tramways, motor omnibuses, and underground electric railways." One of the tables so prepared, which may be taken as a sample, shewed the passenger traffic between the City on the one hand and Victoria Station and a number of stations in two of the three parishes and in another parish on the other hand, and shewed that in 1904 the number of passengers carried was 7,819,665, and the receipts 85,501*l.*, and that the following decreases occurred:—1905 below 1904, 765,826 in passengers and 8761*l.* in receipts; 1906 below 1904, 1,161,400 in passengers and 14,057*l.* in receipts; 1907 below 1904, 2,106,073 in passengers and 23,814*l.* in receipts.

An affidavit was made in opposition to the orders by John Arthur Johnson, the town clerk of the borough of Southwark, who was also the clerk to the assessment committee, in which he stated that on March 25, 1908, he and the assistant town clerk had an interview with Hitchcock, when the latter applied on behalf of the managing committee to have the lines of

railway in the three parishes inserted in a provisional valuation list for each of the parishes at reduced gross and rateable values upon the ground that the receipts from local passenger traffic had diminished by the competitive traffic of the tramways, tube railways, and motor omnibuses, mentioning certain figures, substantially the same as those set out in the letters of March 26, 1908; that he asked Hitchcock for the information of the council as overseers to state any specific cause to account for the diminution of receipts arising within the parishes either during the assessment year or since the last quinquennial valuation, and Hitchcock said that he could not mention any specific cause, but that the diminution of receipts was in itself a sufficient cause. He asked Hitchcock to put his application in writing, which he did by the letter of March 26. The affidavit (so far as material) went on: "4. The rating committee of the council of the said borough acting as overseers of the said parishes at a meeting held on March 30, 1908, considered the said application, and after investigation came to the conclusion that, even assuming that there had been a diminution of local passenger traffic at certain stations on the managing committee's system as stated . . . . such diminution was not a fair test of any reduction in value of the said lines of railway and appurtenances for rating purposes in the said parishes, and that there had been no alteration in value of the said lines of railway and appurtenances. They also came to the conclusion that, even if there was a diminution of receipts from local passenger traffic as stated, there was not a diminution in value of the said hereditaments due to any cause within the meaning of s. 47 of the Valuation (Metropolis) Act, 1869. (1) They accordingly refused to make

(1) Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), s. 47: "If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value, the following provisions shall have effect:

"(1.) The overseers of the parish in which such hereditament is situate may, and on the written requisition of the assessment committee or of any ratepayer of the union or of the surveyor of taxes for the district shall, send to the assessment committee a provisional list containing the gross and rateable value as so increased or reduced of such hereditament:

"(2.) A copy of the requisition shall be sent by the person making it to

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any provisional list to include the said hereditaments . . . . 5. Each of the facilities for passenger locomotion referred to in paragraph 5 of the said affidavit (Hitchcock's affidavit), namely, the underground electric railways, electric tramways, and lines of motor omnibuses, was in existence at the date of the quinquennial valuation in 1905. The said railway was subject to the same competition in 1905 as it is now. 6. There have been no additional facilities for passenger locomotion of the nature referred to created in or near the said borough since April 6, 1907, when the assessment year, during which the said managing committee applied for insertion of their lines of railway and appurtenances in a provisional valuation list, commenced. 7. The said assessment committee, on the matter of the said application for an insertion of the said lines and appurtenances in a provisional valuation list coming before them, having considered the same and all the facts relevant thereto, also came to the conclusion that, even assuming that there had been a diminution of receipts from local passenger traffic at certain of the local stations of the said managing committee, the same was not a fair test of any reduction in value of the said hereditaments for rating purposes, and that in fact no change in the value of the said lines of railway and appurtenances within the said parishes had taken place within the meaning of s. 47 of the Valuation (Metropolis) Act, 1869, and accordingly decided not to direct the said lines and appurtenances to be inserted in a provisional valuation list." The affidavit further stated that on June 22, 1908, the deponent, as the clerk to the assessment committee, received notices of objection to the third supplemental valuation list for the parishes, deposited on or about May 30, 1908, the grounds of objection being that the managing committee felt aggrieved by the list, (1.) by the omission from the list of the property in question;

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the clerk of the assessment committee, and if within fourteen days after the requisition has been served on the overseers they make default in sending such provisional list he shall forthwith summon the assessment committee, and the assessment committee shall appoint a person to make such provisional list in the same manner as is in this Act provided in the case of the overseers failing to transmit a valuation list . . . .'

(2.) by the list not being in conformity with the provisions, particularly s. 46, of the Valuation (Metropolis) Act, 1869; and (3.) by the list not shewing the alteration in the gross and rateable values of the property, which values had been depreciated and reduced by reason of tramway and other competition which had necessarily substantially and permanently reduced the receipts and profits from local traffic; that the objection was heard by the assessment committee on July 2, and they were of opinion that it had not been shewn that any such alteration in value had taken place which entitled the property to appear in the list, and it was accordingly resolved to overrule the objection and not to insert the property in the supplemental list.

Thereupon, on July 21, the above-mentioned orders nisi for a mandamus were obtained on behalf of the South Eastern and Chatham Railway Companies' managing committee.

Nov. 5. *Sir R. B. Finlay, K.C.*, and *W. Mackenzie*, for the assessment committee, shewed cause. The managing committee, having objected to the supplemental list, ought to have appealed to quarter sessions against the disallowance of that objection. There having been that alternative remedy open to them, the Court will not grant a mandamus. Sect. 46, sub-s. 3, of the Valuation (Metropolis) Act, 1869, provides that the same proceedings shall be had in the case of a supplemental list and a new valuation list as are directed in the case of the valuation list made in the first year after the passing of the Act. Sect. 32 of the Act gives a right of appeal to the assessment sessions, now by s. 42, sub-s. 10, of the Local Government Act, 1888, the London quarter sessions.

Secondly, the managing committee have not brought themselves within s. 47 of the Valuation (Metropolis) Act, 1869. They have not shewn that in the course of the year the value of the lines in question has been "from 'any cause' reduced in value" within the meaning of the section. The cause must be one which directly affects the assessable value of the particular hereditament, and must be a cause somewhat analogous to a structural alteration of or addition to the

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hereditament: *Camberwell Assessment Committee* v. *Ellis.* (1) Mere diminution of receipts is not a "cause" within the meaning of s. 47. The suggested competition by the underground electric railways, electric tramways, and motor omnibuses existed in and before 1905, when the quinquennial valuation list was made. No new "cause" has arisen since that date. The competition did not come into existence during the year in question, but existed for some years previously. It simply continued during the year. It is not alleged in the affidavits that any new tramways or new underground electric railways have been opened in the three parishes in question. A mere fall in the receipts of a railway is not sufficient to call upon the rating authority to make a provisional list. There must be something of a more or less permanent nature directly affecting the annual value of the particular hereditament.

The cutting off of a feeding line by the breakdown of a bridge outside the parish which reduces the receipts of the line within the parish might be a cause for making a provisional list, because in such a case the value of the particular hereditament would be directly affected. The case of *Reg.* v. *Assessment Committee of St. Mary, Islington* (2), where it was held that the words of s. 47 of the Act "from any cause increased or reduced in value" were not confined to an increase or reduction caused by structural alterations in the hereditament, and that a substantial diminution in profits and income came within the section, may be explained by the fact that in that case the assessment committee refused to act under s. 47 upon the ground that the section only applied where there was a structural alteration in the hereditament, and refused to consider the question of the falling off in receipts. The Court merely ordered a mandamus to issue directing the assessment committee to hear and determine the application. The Court did not say that mere diminution of receipts is sufficient. If the case goes beyond that, it is no longer good law since the decision in *Camberwell Assessment Committee* v. *Ellis.* (1) In the present case the assessment committee, whose duty it was to consider the question, did consider it, and heard and determined it: and under s. 47, sub-s. 2, their

(1) [1900] A. C. 510. (2) (1887) 19 Q. B. D. 529.

decision is final, there being no appeal to quarter sessions in the case of a provisional list as there is under s. 46, sub-s. 3, in the case of a supplemental list. If the assessment committee have heard and determined the application a mandamus will not be issued: *Reg.* v. *Overseers of St. Mary, Bermondsey.* (1) The cases of *Reg.* v. *New River Co.* (2) and *Reg.* v. *Poplar Union Assessment Committee* (3) related to the supplemental valuation list, and they arose upon cases stated by the assessment sessions upon appeal against the list, and are therefore not in point. *Reg.* v. *Poplar Union Assessment Committee* (3), however, decided that the falling off in receipts must be of a permanent nature.

Next, the affidavits filed on behalf of the prosecutors only shew a falling off in receipts for local passenger traffic between certain London and suburban stations. Neither the through passenger traffic nor the goods traffic has been brought into account. The assessment committee might well refuse to act upon such evidence as that, which left out of account a very important source of traffic. It does not follow that because there has been a decrease in local passenger traffic there has been a decrease in the total traffic carried in the parishes. The Court ought not, therefore, to grant a mandamus.

Sir R. D. M. Littler, K.C., and *Ryde*, for the prosecutors in support of the orders. The affidavits filed on behalf of the prosecutors shew a prima facie case of a permanent falling off of receipts from local passenger traffic. That brings the case within the preliminary words of s. 47 of the Valuation (Metropolis) Act, 1869, and is sufficient to call upon the assessment committee to appoint a valuer to make a provisional valuation list. The valuer will then have to inquire into the matter and make a valuation, and insert it in a provisional valuation list, and there is no appeal against that list. It is not the duty of the assessment committee under s. 47, sub-s. 2, of the Act themselves to value the hereditament. It is their duty to appoint a valuer who will inquire into the merits of the case and make a provisional valuation list. The benefit to the ratepayer in having a provisional list made is that, if the value stated in that list is

(1) (1884) 14 Q. B. D. 351. (2) (1879) 4 Q. B. D. 309.
(3) (1884) 13 Q. B. D. 364.

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found upon the next revision of the valuation list to be too high, then by the last clause of sub-s. 10 of s. 47 the amount of the rate which has been overpaid in consequence of the larger value having been stated in the provisional list is to be repaid or allowed. That benefit which was intended to be conferred on the ratepayer will be lost unless a provisional valuation list is made out. The assessment committee are not themselves to decide whether a prima facie case has been made out. If that were their duty, the protection afforded by the section to the ratepayer would be worthless. Sect. 47 provides in the first instance, by sub-s. 1, for an application to the overseers of the parish to send to the assessment committee a provisional list. If the overseers refuse to do so, a mandamus will not be granted to compel them to do so: *Reg.* v. *Overseers of St. Mary, Bermondsey.* (1) The reason of that is that sub-s. 2 provides machinery in the nature of an appeal from the overseers by which the ratepayer can apply to the assessment committee, who are bound to act upon a prima facie case being made out. That is the view of Hawkins J. in *Reg.* v. *Overseers of St. Mary, Bermondsey.* (1) The assessment committee must then appoint a valuer to make a provisional list: *Reg.* v. *Assessment Committee of St. Mary, Islington* (2); and if the ratepayer is dissatisfied with the value of his hereditament stated in the list he can, under sub-ss. 4—7, object before the assessment committee to the list, and the decision of the assessment committee upon that objection is final. The question whether there has been an alteration in the value of the hereditament is the same in the case of the supplemental valuation list as in the case of the provisional valuation list: *Ellis* v. *Camberwell Assessment Committee* (3), in the Court of Appeal.

The cases, therefore, which deal with supplemental lists apply to provisional lists. In *Reg.* v. *Poplar Union Assessment Committee* (4) there was a falling off in receipts in respect of the tonnage of vessels coming to the East and West India Docks during the twelve months, and Bowen L.J. said (5) that the fact

(1) 14 Q. B. D. 351.
(2) 19 Q. B. D. 529.
(3) [1900] 1 Q. B. 68, at p. 74.
(4) 13 Q. B. D. 364.
(5) 13 Q. B. D. at p. 371.

of the falling off in the receipts of tonnage rates, with the light shed upon it by a previous continuous fall in former years, amounted to some evidence that during the last year the rateable value of the docks was not what it was before, and that there was prima facie evidence of an alteration in the rateable value. Though that was a case of a supplemental list, the same reasoning applies to a provisional list. Therefore a large and constant diminution of receipts extending over a period of years affords a prima facie case for the making of a provisional list. The decision in *Reg.* v. *Assessment Committee of St. Mary, Islington* (1), is in point. If the ratepayer puts forward a prima facie case, the assessment committee must act upon it under s. 47, sub-s. 2. If they say that there is no prima facie case when there is one, the ratepayer can obtain a mandamus directing them to appoint a valuer. The cause of the alteration in value need not occur in the parish. It may occur by the breakdown of a bridge or the falling in of a tunnel many miles away from the parish, which causes a great decrease in receipts. The affidavits here shewed a prima facie case, and the assessment committee are bound to appoint a valuer.

Secondly, assuming that the assessment committee had jurisdiction to hear and determine the question whether a prima facie case had been made out, they refused to do so. They took up the position that, upon the facts as stated in the affidavits, the reduction in value was not brought about by any "cause" within the meaning of s. 47 of the Act. They seem to have thought that the decision in *Camberwell Assessment Committee* v. *Ellis* (2) precluded them from saying that a reduction in value caused by a diminution in receipts came within the section. That was an erroneous conclusion, and the assessment committee have not heard and determined the application. The mandamus ought therefore to issue.

Sir R. B. Finlay, K.C., in reply. Before sub-s. 2 of s. 47 can come into play the assessment committee must decide whether a prima facie case has been made out that from any "cause" there has been a reduction in value of the hereditament in the course of the year, just as the overseers have to decide it under sub-s. 1.

(1) 19 Q. B. D. 529. (2) [1900] A. C. 510.

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The preliminary words of the section govern sub-s. 2 as well as sub-s. 1 and are a condition precedent to both sub-sections coming into operation. The assessment committee considered that the evidence brought forward here did not shew a prima facie case. For instance, all the traffic receipts were not included, but only a certain portion of them.

LORD ALVERSTONE C.J. This case raises questions, to my mind, of difficulty, but I have come to the conclusion, though with great doubt and hesitation, that the orders must be made absolute. The application is for a mandamus directed to the assessment committee commanding them to appoint a valuer under s. 47, sub-s. 2, of the Valuation (Metropolis) Act, 1869. The overseers had declined to make a provisional list when applied to under s. 47, sub-s. 1, of the Act, and it has been decided in this Court, in *Reg.* v. *Overseers of St. Mary, Bermondsey* (1), that the overseers cannot be compelled by mandamus to send to the assessment committee a provisional list. It may be that one ground of that decision was that there was a remedy given by s. 47, sub-s. 2, of the Act, or it may be that the ground of the decision was that the overseers were in that matter made, by sub-s. 1, the sole judges of fact as to whether there was such a case of increase or decrease of value as would justify them in sending a provisional list to the assessment committee. It is unnecessary, however, to enter upon that discussion, as the point is not before us, and, moreover, even if it were, we are bound by that decision.

The questions which we have to decide are, first, what is the duty of the assessment committee when they are called upon to act under s. 47, sub-s. 2, of the Act, and, secondly, whether in this case the affidavits shew such a state of facts as to give rise to a prima facie case for a provisional list being prepared. The section begins by saying, "If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value, the following provisions shall have effect." It has been decided by cases by which we are bound,

(1) 14 Q. B. D. 351.

and as to which I see no reason to express the slightest doubt, one of which is *Reg.* v. *Assessment Committee of St. Mary, Islington* (1), that a reduction in the rateable value of the hereditament by reason of a diminution of profits is a ground which in some cases may be relied upon to entitle the ratepayer to take the necessary proceedings to have a provisional valuation list made. That is not, indeed, disputed, and counsel for the assessment committee admitted that if the value of a railway was reduced by the destruction during the year of a feeding line outside the parish they would not contend that the case for a provisional list on the ground of a decrease in value had not been made out. With regard to the first of the two questions I have mentioned, I am of opinion that to bring a case within the section it must be established that there is at any rate a prima facie case that the hereditament is reduced in value. The Legislature must be assumed to have known that there are a large number of rateable hereditaments, such as railways and other large undertakings, the rateable value of which is ascertained by working back from the gross receipts so as to arrive at the annual rent which a hypothetical tenant from year to year would give for the hereditament; and I agree with the argument founded upon the judgment of Bowen L.J. in *Reg.* v. *Poplar Union Assessment Committee* (2), when dealing with the right of a dock company to have an alteration in the value of their docks entered in a supplemental list, that the ascertained reduction of gross receipts not due to a temporary cause may be prima facie evidence of a reduction in rateable value, having regard to the fact that the rateable value of hereditaments such as these is ascertained by working back from gross receipts.

Assuming that a requisition by a ratepayer is brought before the assessment committee stating that his hereditament is reduced in value, I am not prepared to say that the assessment committee must act upon that requisition without any inquiry. It is not necessary in this case to decide that question, and I should not be prepared to do so without further consideration. Counsel for the managing committee did not contend that the assessment committee were absolutely bound to act upon the

(1) 19 Q. B. D. 529. (2) 13 Q. B. D. 364, at p. 371.

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requisition, but he did contend, and at present I am disposed to agree with him, that if there is a prima facie case put before the assessment committee, then they must appoint a valuer to solve the question raised by the requisition. One must remember that overseers are supposed to insert the value of properties in the valuation list because of their knowledge of that value. Assessment committees, on the other hand, may or may not have that knowledge, but, however that may be, it is not usual for them to act upon their own opinion. As far as my memory goes, I do not think that there are many, if indeed there are any, cases in which an assessment committee, either in the metropolis or in any other part of England, themselves prepare valuation lists, though no doubt they can make alterations in lists which are put before them and direct valuations to be made. Therefore my present opinion, which has not been arrived at without hesitation, is that under s. 47, sub-s. 2, if a prima facie case has been made out, the duty of the assessment committee then is to appoint a valuer. It may be said with very great force that that is putting a very great privilege or power in the hands of a ratepayer, and that a ratepayer has only to say that he believes there has been a decrease in the value of his hereditament to force the assessment committee to act if the overseers will not. The answer I give to that suggested difficulty is that, if the assessment committee comes to the conclusion that there is really nothing in the requisition, that it is obviously without substance, probably no Court would order the assessment committee to act upon the requisition.

In arriving at the conclusion that it is the duty of the assessment committee to act when a prima facie case has been made out I am a good deal influenced by the argument which has been addressed to us that s. 47 is a section at any rate as much for the benefit of the ratepayers as for that of the parish. It seems to me, looking at sub-s. 10 and at the consequences of the making of a provisional list, that the ratepayer will not be fully protected unless this effect is given to sub-s. 2, namely, that, upon a prima facie case being made out, a provisional list is to be prepared by a valuer upon the direction of the assessment committee, because, as I understand the matter, if the only remedy of the ratepayer

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in such a case is to apply to have his property inserted at a reduced value in the supplemental valuation list, the result will be that he will only get redress in respect of rates made after the supplemental valuation list has come into operation. On the other hand, the provisional valuation list takes effect immediately, and therefore it seems to me to be essential that, where a prima facie case of a reduction in value of a rateable hereditament has been made out, a provisional list should be made. For these reasons I come to the conclusion that, if a reduction in value from any cause is prima facie made out, the assessment committee must act under s. 47, sub-s. 2, and appoint a valuer.

The next question, which has presented great difficulty to my mind, is whether a prima facie case has been made out upon the affidavits before us. I may state that I have with some reluctance come to the conclusion that we ought to consider that they do establish a prima facie case. I have always thought that it was never intended that during the period between two quinquennial valuations there should be a constant contest as to a change in value due to a general alteration in what may be called the circumstances affecting the rateable value of the hereditaments; that it was intended that any such general change of circumstances should be estimated and allowed for at the time when the quinquennial valuation was made by the experience of the past and the expectation of the future; and that the scheme of the Act is that there should not, as a general rule, be intermediate contests. I still adhere strongly to that view, but it seems to me that that view must be subject to this, that if there has been an increase or reduction in value such as is contemplated by s. 47 of the Act, that section comes into operation. If it could fairly be said that all that was shewn by the affidavits was that certain competition, which was in existence at the time when the quinquennial valuation list was made, was telling more against the railway company than they expected it would, or if the only conclusion to be drawn from the affidavits was that certain streams of traffic had been cut off whereas others might have increased, I should not have acted upon the matter. But there are one or two passages in the affidavit of

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Renwick, who has exhibited a series of tables, which undoubtedly shew that there has been a continuous falling off in the gross receipts since the year 1904, a falling off which is still going on, and there is a passage in his affidavit which says that "I am advised and verily believe that the said lines of railway have been considerably reduced in value by reason of the competition of electric tramways, motor omnibuses, and underground electric railways." If that does not mean that the rateable value is reduced, we ought not to act upon it; but when we take that in conjunction with the affidavit of Hitchcock, who gives the same causes for the diminution in the receipts, and who specifically states that the lines of railway in question have been considerably reduced in value, I cannot go the length of saying that those affidavits do not establish a prima facie case, though I can quite understand other people taking a different view. When I come to the affidavit of Johnson, which at first I thought almost conclusively answered any suggestion that there had been a reduction in rateable value due to causes which might be taken into consideration, I am bound to say that I am pressed with the observation that, if one looks at paragraph 7 of the affidavit, it is not at all clear that the decision of the assessment committee was based on there being in fact no reduction in value. Paragraph 7 states that the assessment committee came to the conclusion "that, even assuming that there had been a diminution of receipts from local passenger traffic at certain of the local stations of the said managing committee, the same was not a fair test of any reduction in value of the said hereditaments for rating purposes, and that in fact no change in the value of the said lines . . . . had taken place within the meaning of s. 47 of the Valuation (Metropolis) Act, 1869." That is a statement similar to that contained in paragraph 4, where the opinion of the overseers is given, namely, that, even if there had been a diminution in receipts from local passenger traffic, there was not a diminution in value of the hereditaments due to any cause within the meaning of s. 47 of the Act. I think, therefore, that we ought to hold that a sufficient prima facie case has been made out for calling upon the assessment committee to act under s. 47, sub-s. 2, and I am the more inclined to come to this conclusion because,

if this mandamus is refused, we shall be depriving the railway company of any possible remedy.

It is only necessary to say a very few words upon the authorities. The decision in *Reg.* v. *Assessment Committee of St. Mary, Islington* (1), does not, in my opinion, compel us to order this mandamus to issue. That case proceeded mainly upon the view that, there being in fact a reduction of value, the assessment committee decided that it did not come within the opening words of s. 47, because a structural alteration in the hereditament itself must be shewn. The point which has troubled me was not raised in that case, namely, whether there was prima facie evidence of a reduction in value. In that case there is nothing to shew that there was any dispute that there had been a reduction in fact in rateable value; the dispute was whether such a reduction in value as there was in that case came within s. 47 at all. The case of *Reg.* v. *Overseers of St. Mary, Bermondsey* (2), is, as I have said, only an authority that a mandamus will not lie to the overseers to compel them to act under s. 47, sub-s. 1. With regard to the decision of the House of Lords in *Camberwell Assessment Committee* v. *Ellis* (3), it does not seem to me to assist us much in determining this question. The Lord Chancellor said (4) that he did not mean to lay down any other general principle than this, that there must be something beyond the mere suggestion of the valuer that the house is worth more than it is assessed at. The decision in the *Camberwell Case* (3) was that the causes of the increase in value relied upon were far too general and far too wide; it does not overrule in any way the case of *Reg.* v. *Assessment Committee of St. Mary, Islington.* (1) There remain the two cases of *Reg.* v. *New River Co.* (5) and *Reg.* v. *Poplar Union Assessment Committee.* (6) They were both cases of supplemental lists, and are useful upon the point of view put forward in argument that the same rule applies to a provisional list as to a supplemental list.

I therefore come to the conclusion that in the circumstances we ought to make the orders absolute.

(1) 19 Q. B. D. 529.
(2) 14 Q. B. D. 351.
(3) [1900] A. C. 510.
(4) [1900] A. C. at p. 518.
(5) 4 Q. B. D. 309.
(6) 13 Q. B. D. 364.

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BIGHAM J. I have had great difficulty about this case, and I am not at all sure that, if my Lord had not taken the view that he has taken, I should not have thought it right to discharge the orders. It seems to me that it may be said that before the provisions of s. 47 can come into operation it must appear that in the course of the year the rated hereditaments have been reduced in value by some cause of a permanent kind. If I were satisfied that the assessment committee had come to the conclusion that no reduction had been shewn in this case by the prosecutors I should have been prepared to discharge the orders.

But I do not think that Johnson's affidavit goes far enough. In paragraph 7 he says that the assessment committee came to the conclusion that "no change in the value of the said lines of railway and appurtenances within the said parishes had taken place," not within the year, but "within the meaning of s. 47." I cannot help thinking that the assessment committee have, or may have, disregarded altogether the case which was made out on the affidavits filed on behalf of the railway company, and have considered that as a matter of law they were precluded from coming to the conclusion that they ought to act upon that prima facie case. I desire to say this, that I think that, if the assessment committee had proceeded to consider the matter as simply one of fact and had come to the conclusion as a matter of fact that there had been no reduction in value, these orders ought to be discharged. But they do not appear to me to have done that. They appear to me to have accepted the facts as stated in the affidavits, and to have said that those facts did not in law shew a reduction in value from a cause covered by s. 47 of the Act, and that therefore the duty of directing a provisional list to be made had not arisen. I do not think that that was the right way of dealing with the case. I think that they ought to have inquired whether in point of fact there had been a reduction in value so as to bring the case within the preliminary words of s. 47. They do not appear to have done that, and therefore I agree that the orders ought to be made absolute.

WALTON J. I agree. It seems to me that s. 47 does not provide for and does not contemplate any investigation as to

value or valuation by the assessment committee. If the overseers do not, upon the ratepayer's requisition, send to the assessment committee a provisional valuation list, a meeting of the assessment committee has to be summoned. What have the assessment committee to do? They "shall appoint a person to make such provisional list in the same manner as is in this Act provided in the case of the overseers failing to transmit a valuation list." Therefore, upon a copy of the requisition being sent to the clerk of the assessment committee, and upon the overseers making default for fourteen days in sending the provisional list to the assessment committee, the latter's duty is not to value, but to appoint a valuer.

Now, though the case is not by any means free from difficulty, it seems to me that, if there is a prima facie case before the assessment committee shewing an increase or decrease in the value of a hereditament, it is the duty of the committee to appoint a valuer to value, and to insert the value in a provisional list. I may further point out in this connection that by s. 47, sub-s. 1, of the Act the proceedings may be initiated—that is, the requisition may be made—by the assessment committee themselves. They may be the parties initiating the proceedings. If a provisional list is made by the valuer, then apparently, unless there is some objection to it by the occupier of the hereditament or by the surveyor of taxes, the assessment committee have nothing further to do with it. By sub-ss. 7 and 8 it becomes the provisional list without any confirmation or consideration by the assessment committee, and comes into operation at once. If there is an objection made to it either by the occupier or by the surveyor of taxes, then the matter comes before the assessment committee under sub-ss. 4, 5, and 6. Another matter which weighs with me very strongly in this case is that sub-s. 10 seems to me plainly to indicate that, if the result of a ratepayer's requisition is that, when the provisional list is made, he finds that he gets practically no relief, or not such relief as he ought to have, it clearly was intended that he should have a remedy by way of appeal, not from the provisional list, but from the next supplemental valuation list, the result of the appeal, if in favour of the ratepayer, relating back to the provisional list. That remedy by

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way of appeal, in so far as it relates back, is only available when a provisional list has been made, and, if the contention put forward on behalf of the assessment committee were to prevail, it is clear that the ratepayer would lose that remedy altogether if the assessment committee came to the conclusion that they would not appoint a valuer, and he would have no relief even though the result of an appeal from the next supplemental valuation list might shew that there had been a very considerable reduction in value. For the reasons given by my Lord I agree that the orders must be made absolute.

Orders absolute.

W. F. B.

The assessment committee appealed.

Dec. 4, 5, 7. *Sir R. B. Finlay, K.C.*, and *W. Mackenzie*, for the assessment committee. In order to raise the duty imposed on the overseers and assessment committee respectively by s. 47, sub-ss. 1, 2, it must be established, first, that there has in fact been an increase or a reduction of the value of the hereditament through the cause alleged; and, secondly, that in point of law such an increase or reduction has occurred through such a cause as to bring the case within the initial words of the section: *Camberwell Assessment Committee* v. *Ellis*. (1) The appellants contend, in the first place, that the affidavits relied on by the prosecutors do not shew that there has in fact been a reduction of the value of the railway in the parishes in question through the cause alleged. At the utmost they merely shew that there has been a reduction of the local passenger receipts between certain stations, but that is not sufficient of itself to shew that there has been a falling off of the total receipts of the railway companies in respect of traffic on their lines in the parishes, for other traffic on the railway over the portion of the line in question may have increased. The onus of shewing that there has been a reduction in the value of the hereditament lies on the managing committee of the railways, who know the particulars of their own traffic, and they must establish the fact of such a reduction before the

(1) [1900] 1 Q. B. 68; [1900] A. C. 510.

duty of the assessment committee to appoint a valuer under the section can arise. It is a fallacy to assume, as was done in the Divisional Court, that a prima facie case of a reduction in value can be made out when the evidence is equally consistent with there having been no reduction in value.

It may be admitted, however, that the really important question which is raised by this case is whether, assuming the reduction of receipts alleged by the managing committee of the railways to have been proved, the reduction of value is of such a nature and arises through such a cause as to come within the section. The tramways, tube railways, and lines of motor omnibuses, the competition by which is relied upon, all existed at the date of the quinquennial valuation, and the probable result of their competition in the future during the quinquennial period must be assumed to have been taken into consideration in the estimate of the value of the railways made for the purposes of that valuation. It is obvious that all causes of a reduction in value would not come within the meaning of s. 47. A general fall in the value of all property, or in the value of certain classes of property throughout the district, caused by bad times, could not have been intended to constitute a cause for going behind the quinquennial valuation in the case of a particular hereditament during the quinquennial period. The expression "any cause" in the section must mean some new cause arising after the quinquennial valuation, and specifically affecting, during the year in which the provisional list is applied for, the particular hereditament, in a special manner analogous to the manner in which a hereditament is affected by the addition thereto or erection thereon of a building. A cause already in operation at the time of the previous quinquennial valuation will not be within the section. Mere reduction of receipts through competition is not a "cause" within the meaning of s. 47. The cases of *Reg.* v. *New River Co.* (1) and *Reg.* v. *Poplar Union Assessment Committee* (2) had relation to the supplemental list under s. 46 of the Act, and therefore are not authorities with regard to the effect of s. 47.

The mandamus asked for is not in the right form. If the

(1) 4 Q. B. D. 309. (2) 13 Q. B. D. 364.

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conclusion is that the assessment committee refused the application because they erroneously took the view that such a reduction in value as was alleged was not within the meaning of the section, and therefore did not go into the question of fact, the matter ought to be sent back to them to hear and determine according to law. Therefore the mandamus ought to be to hear and determine, not to appoint a valuer. It is submitted that the intention of the section clearly is that, before being bound to appoint a valuer, the assessment committee must be satisfied that there has been in fact a reduction in the value of the hereditament as alleged: see per Lord Coleridge C.J. in *Reg.* v. *Assessment Committee of St. Mary, Islington.* (1)

Ryde, for the prosecutors. It is clear from the judgments in *Camberwell Assessment Committee* v. *Ellis* (2) that "any cause" in s. 47 need not be ejusdem generis with a structural alteration of the hereditament. Where the value of a particular hereditament is affected by general causes affecting all hereditaments in the parish alike, the case might not come within the section; but a substantial permanent alteration specially affecting the value of the particular hereditament, due to a definable cause, though not necessarily confined to that hereditament alone, comes within the words "is from any cause increased or reduced in value" in s. 47: see per Lord Davey in *Camberwell Assessment Committee* v. *Ellis*. (3) In that case (4) Lord Halsbury L.C. declined to lay down any general proposition with regard to the nature of the circumstances which would justify the application of s. 47, saying in substance that each case must depend upon its own facts, but that there must be something beyond the mere suggestion that the hereditament is worth more or less than the amount at which it is assessed. That case is a clear authority for the contention that a considerable permanent diminution of the profits derived by a railway company from its line by reason of the competition of other modes of conveyance, from which diminution a decrease of the rent which a hypothetical tenant would give may be inferred, is such a cause as would come within the words "any cause"

(1) 19 Q. B. D. 529.
(2) [1900] A. C. 510.
(3) [1900] A. C. 510, at p. 523.
(4) [1900] A. C. at pp. 517, 520.

in the section. The cases of *Reg.* v. *New River Co.* (1) and *Reg.* v. *Poplar Union Assessment Committee* (2), which are in point, especially the latter, were cited in *Camberwell Assessment Committee* v. *Ellis* (3), and, though they were not expressly approved of in the judgments, there is no expression indicating any disapproval of them whatever, which would hardly be the case if the learned Law Lords had not considered them good law.

With regard to the form of the mandamus, the assessment committee cannot rightly be said under the circumstances to have declined to hear and determine the matter. They have heard and determined the matter, and refused to appoint a valuer as under the circumstances they were bound to do. The result of sending back the matter for them now to hear and determine would be to throw it over the next revision of the valuation list, with the result that the railway companies may lose the benefit provided by s. 47, sub-s. 10, which provides that "if, when the next revision of the valuation list takes place, the list as approved and altered on appeal contains a smaller value for the hereditament comprised in a provisional list than the value stated in such provisional list, the amount of the rate or tax which has been overpaid in consequence of the larger value having been stated shall be repaid or allowed." The assessment committee ought not to be allowed, by delaying to do what it was their duty to do, to prejudice those who were interested in the performance of that duty.

W. Mackenzie, for the assessment committee, in reply.

VAUGHAN WILLIAMS L.J. I will first deal with the question as to the form of the mandamus. In my judgment the form in which it was directed to issue by the Divisional Court is quite correct, and there is nothing in the objection taken by the appellants to prevent us from giving effect to what appears to us to be the justice of the case. It is plain to me that, if we were bound to act upon the suggestion made by the appellants as to the form of the mandamus, the result would be that, at any rate for a very considerable period, the respondents would be deprived of the

(1) 4 Q. B. D. 309. (2) 13 Q. B. D. 364.
(3) [1900] A. C. 510.

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benefit which the legislation here in question aimed at conferring upon them. I do not think that we are bound to hold that the mandamus must be issued in the form suggested. It was suggested that the mandamus, if issued, must be, not to appoint a valuer, but to hear and determine the matter. In my opinion that is not right for the reason, amongst others, that this is not a case in which the assessment committee have refused to entertain the matter. They have, as it appears to me, dealt with the matter and come to a conclusion which is one of law, namely, that on the facts, which are not really in dispute, the case is not one which comes within the opening words of s. 47 of the Valuation (Metropolis) Act, 1869. Those words are as follows: "If in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value, the following provisions shall have effect." I am happy to say that Sir Robert Finlay during his argument accepted the position that a great public body representative of the ratepayers at large, such as the appellants, and the managing committee of the railways would not desire to have this case determined on any technical ground, or any mere question as to the sufficiency of the evidence as appearing from the requisition made by the respondents or the accounts submitted by them, but that, the facts not really being in dispute, it should be decided on the question of principle.

I think that the decision of the Divisional Court was correct and that the mandamus was rightly ordered to issue. It was suggested that we ought not to have regard to certain authorities which were cited because they related not to a provisional list, but to a supplemental list. In my opinion, for the purposes of the question whether there has been such a change of circumstances as is essential in order to bring a case within the words of s. 47, there is no difference whatever between a provisional and a supplemental list. That being so, it appears to me that there has been a continuous current of authority on the subject. First there was *Reg.* v. *New River Co.* (1) That was followed by *Reg.* v. *Poplar Union Assessment Committee.* (2)

(1) 4 Q. B. D. 309. (2) 13 Q. B. D. 364.

Then came *Reg.* v. *Assessment Committee of St. Mary, Islington* (1), and finally there is the case of *Camberwell Assessment Committee* v. *Ellis.* (2) The current of authority in all those cases seems to me to flow in the same direction. It is quite true that at one time it was suggested that the alteration to be relied upon as a ground for proceedings under s. 47 must either be caused by the addition to or erection on the hereditament of a building, or it must be an alteration of its value caused by something in the nature of a structural alteration. To my mind it has been absolutely determined by the decision of the House of Lords in *Camberwell Assessment Committee* v. *Ellis* (2) that this is not so. It is true that the House of Lords decided in that case that the general words "any cause," following the words "addition thereto or erection thereon of any building" in s. 47, must be construed as meaning a cause in one sense ejusdem generis with the cause previously mentioned, but, as I understand the matter, all that they meant is that which is very clearly and concisely expressed by Lord Davey where he said (3): "It is not sufficient to say that there has been an alteration in value, but you must also point to some definable cause to which that alteration is due, and that cause must be one which affects the assessable value of the particular property"; just as an addition to a house might alter the assessable value of the premises. Lord Halsbury, although he did not lay down so precise a rule as Lord Davey, pointed out that the question whether there has been such an alteration in value as brings the case within s. 47 is one which must be decided according to the circumstances of each case, and that the inquiry must always in each case be whether there has been a substantial alteration affecting the assessable value of the particular hereditament in question. It seems to me that really, in coming to the conclusion at which the House of Lords in that case arrived, they were laying down nothing which was in any sense new. On looking at the three earlier cases to which we have been referred, it will be found, I think, that, in dealing with the question what was a sufficient alteration to bring a case within s. 47, the view taken there was that it must be such

(1) 19 Q. B. D. 529. (2) [1900] A. C. 510.
(3) [1900] A. C. 510, at p. 523.

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an alteration as altered the assessable value of the particular hereditament. In none of the three cases, *Reg.* v. *New River Co.* (1), *Reg.* v. *Poplar Union Assessment Committee* (2), and *Reg.* v. *Assessment Committee of St. Mary, Islington* (3), is there any pretence for saying that the alteration recognized by the Court as sufficient to bring the case within the section was an addition of a building to, or erection of a building on, the hereditament itself, or anything in the nature of a structural alteration of it. In *Reg.* v. *New River Co.* (1) there had been, no doubt, an alteration which concerned structural matters in the sense that there had been an increase in the number of houses which were connected with the mains of the company, but in *Reg.* v. *Poplar Union Assessment Committee* (2) there was no structural alteration of any kind whatever involved. The alteration in value of the docks was caused by a falling off in the receipts from tonnage rates on vessels coming into the particular docks. One knows as a matter of history that the value of the docks up the river was considerably affected by the establishment of the docks at Tilbury lower down the river. Under these circumstances I think we have a right to regard the conclusion at which we have arrived in this case not only as depending upon the decision in *Camberwell Assessment Committee* v. *Ellis* (4), but as one which is really supported by a series of antecedent cases. With regard to the case of *Reg.* v. *Poplar Union Assessment Committee* (2), I wish to say that the passage cited from the judgment of Bowen L.J. in that case appears to me to express very clearly the view of the law on this question which he there took. He said: "The fact of there being less tonnage coming into the docks, with the light shed upon it by a previous continuous fall in former years, amounts to some evidence that during the last year the rateable value of the docks was not what it was before." There is only one other matter with which I propose to deal, namely, the suggestion that, because at the time of the last quinquennial valuation the tramways, tube railways, and lines of motor omnibuses, which are referred to as being the primary cause of the fall in the respondents' receipts from passenger traffic, were already in

(1) 4 Q. B. D. 309.
(2) 13 Q. B. D. 364.
(3) 19 Q. B. D. 529.
(4) [1900] A. C. 510.

existence, the competition by them was a matter which ought to have been, and must be assumed to have been, taken into consideration by those who made that valuation. I think that the observations of Cockburn C.J. in *Reg.* v. *New River Co.* (1) which were cited to us by the respondents' counsel go far to negative that suggestion. He said: "If by any extraordinary and unlooked for circumstances the value of the given property should be greatly increased on the one hand, or greatly decreased on the other, then the assessment ought not to continue to exist and taxes to be levied upon such an altered state of circumstances." It was argued for the appellants that, inasmuch as the tramways and tube railways and motor omnibuses were in existence at the time of the last quinquennial valuation, it could not be said that the fall in the respondents' suburban traffic arising therefrom was an "extraordinary and unlooked for circumstance." Even if the passage which I have cited stood alone, I should not be inclined to give the effect which the appellants' counsel seek to give to the words, but it so happens that Cockburn C.J. proceeds to explain his meaning a little further on by saying: "It is only where substantial alterations have taken place, which really do make all the difference to the individual who is to be assessed on the one hand, or to the parish which is to have the benefit of the tax on the other, that an inquiry should be directed." I think that in the present case there was an alteration, affecting the particular hereditament in question, so permanent and of such a substantial character that it ought to be recognized as an alteration sufficient to bring the case within the operation of s. 47 of the Act. For these reasons I think that the appeal should be dismissed.

Buckley L.J. For the purposes of my judgment in this case I need refer to only two matters of fact. The first is that, by reason of the tramways, tube railways, and motor omnibuses which compete with the railway companies in the parish in question, there has been a large falling off in the local traffic of those companies year by year. It still continues, and is not a temporary matter. This is shewn by figures supplied by the

(1) 4 Q. B. D. 309.

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companies, indicating an existing steady diminution in their receipts from the local traffic owing to that competition. The second is whether, as was said by Sir Robert Finlay, that "cause" existed when the last quinquennial valuation was made in 1905. I am not sure that he is right in that contention. I apprehend that he means that the tramways and tube railways had been constructed, and the motor omnibuses were running at that date, but that does not to my mind shew that the "cause" in its entirety existed at that time. As regards the motor omnibuses, for instance, they are put upon or taken off a particular route according as they pay or do not pay. The same thing applies, though in a less degree, to tramways and tube railways. A greater or less number of tramcars or trains will be run according as the public are attracted to or discouraged from accepting that mode of locomotion. Therefore it is only within limits, I think, that the "cause" in question can be said to have existed in 1905. In what I have to say I propose to deal with those two matters.

The initial words of s. 47 of the Valuation (Metropolis) Act, 1869, provide that "if in the course of any year the value of any hereditament is increased by the addition thereto or erection thereon of any building, or is from any cause increased or reduced in value, the following provisions shall have effect." As regards those words "any cause," I understand the House of Lords to have decided in *Camberwell Assessment Committee* v. *Ellis* (1) that they mean some cause analogous to structural alteration of premises in the sense that there must be a cause which effects an appreciation or depreciation of the particular hereditament in question. It need not be a cause which affects that hereditament only, but it must be a cause which can be identified as applying particularly to the hereditament whose rateable value is under consideration. Lord Halsbury L.C. in his judgment in that case more than once used the term "alteration of circumstances" (a term not found in the Act) in such a way as to shew very clearly that what he meant was that any one seeking to bring a case within s. 46 or s. 47 of the Valuation (Metropolis) Act, 1869,

(1) [1900] A. C. 510.

must shew an alteration of circumstances which produces an effect upon the particular hereditament; he must condescend upon a cause which, although it be not in its nature structural, yet directly affects the value of the particular hereditament whose assessable value is in question. At the time when that case was decided in the House of Lords three cases, which I will mention, had been decided, two of them relating to the supplemental list, and the third to the provisional list. For the present purpose there is in my opinion no material distinction between a supplemental and a provisional list. The first of those cases was *Reg.* v. *New River Co.* (1), where mains of a water company, which had been laid at the time of the making of the quinquennial valuation list, had subsequently increased in their productive power by reason of the fact that new houses had been built which had been connected with them. The next was *Reg.* v. *Poplar Union Assessment Committee* (2), where there had been a falling off in the receipts from tonnage rates on vessels using the docks. The third was *Reg.* v. *Assessment Committee of St. Mary, Islington* (3), which related to a provisional list, and in which there had been a substantial decrease of the profit earned by means of the property there in question. All those three cases were cited to the House of Lords in *Camberwell Assessment Committee* v. *Ellis* (4), and there was not a word said in the judgments taking any exception to the decisions given in those cases. It is true that they were not affirmatively mentioned, but, if the learned Law Lords had thought that any of those decisions proceeded on a wrong principle, they would surely have said so. In the present case there is established, as it seems to me, the existence of a cause which specially affects the particular hereditament in question. A railway, as a mere construction of wood and iron, is valueless except in so far as it produces profit. The rateable value of such a hereditament is necessarily measured by the profit it earns. There is established here a cause intimately connected with the particular hereditament, namely,

(1) 4 Q. B. D. 309.
(2) 13 Q. B. D. 364.
(3) 19 Q. B. D. 529.
(4) [1900] A. C. 510.

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a shrinkage of the earning power of the property to be assessed through competition by other means of locomotion.

It was urged that, in the case of a property like a railway, which earns profits from various sources, it will not suffice for the present purpose for the company to shew that the profit arising from one particular source is diminishing, but that they must go on to shew that the profit arising from other sources is not increasing, that there is a reduction in the total amount of profit earned. I understand that contention to be wrong. I think the contrary was decided in *Reg.* v. *Poplar Union Assessment Committee.* (1) It was decided in that case that, for the purpose of a provisional list, you are not to start afresh and make a valuation de novo; you are to assume that the valuation in the existing list is right except so far as it is attacked; and, if it is attacked on a particular point, namely, on the ground that the profit from a particular source is diminishing, you are not bound to condescend on all the other sources of profit and take the whole valuation afresh. This clearly appears in the judgments of Lord Esher M.R. and Bowen L.J., and that this was the exact point involved is shewn by the introductory portion of the judgment of Fry L.J. That learned Lord Justice differed, and the point upon which he differed he stated thus: "The second question is this, assuming that the alteration is shewn to have taken place during the year, in what way are the sessions to proceed? Is the rateable value to be ascertained de novo, or is the alteration only to be ascertained? Here I have the misfortune to differ from my learned brethren." He thought that the proper course was to ascertain the rateable value de novo, whereas the majority of the Court thought otherwise and that the existing assessment must be assumed to be right except so far as it was successfully attacked. I may add that this point is not, I think, open to the appellants, because, on the terms of Mr. Hitchcock's affidavit, the evidence is, so far as he can speak in a matter of such complexity, that the whole traffic receipts are diminishing by reason of this cause. This railway, as it runs through these metropolitan parishes, carries both the local traffic and the long distance traffic. The rateable value in

(1) 13 Q. B. D. 364.

the parish will be determined by bringing both into computation. What Mr. Hitchcock says in the sixth paragraph of his affidavit is that there has been a continuous fall in the receipts derived by the committee from the occupation of the said lines of railway; that is to say in the traffic receipts from the lines of railway, wheresoever that traffic is going, not confining it to the local traffic. Again in paragraph 13 he says: "I am advised and verily believe that, in view of the reduction in the value of the said lines of railway due to the diminution of the business done thereon, and shewn by the continuous fall in the receipts earned by the occupation thereof, the said committee are entitled to have the said lines of railway inserted in the provisional valuation lists for the said respective parishes." So that, as the evidence stands, I think it is that not merely the local traffic is diminishing, but that, taking into account the shrinkage in the local traffic, the receipts upon the whole are diminishing. It seems to me, therefore, that there is here shewn a "cause" within s. 47.

The other point to which I said that I would refer is this: Was that a cause which existed in 1905, and, if so, is it excluded by reason of that fact? In my judgment the fact that a cause existed at the date of the quinquennial valuation is by no means conclusive as to its effect for the present purpose. Let me give an illustration. Suppose that, at the date of the quinquennial valuation, there was standing a house of an annual value of 500*l.*, but there was a covenant to pull it down at the end of three years, and then to throw the land open and dedicate it to the public. Sir Robert Finlay said, and, I think, rightly said, that, during the three years when the house was standing, the fact that the house had to be pulled down at the end of three years was a matter which the assessment committee might properly take into account; for, although the Parochial Assessment Act of 1836 says that you are to look for a hypothetical tenant from year to year, it is established by authority that for many purposes the matter must be regarded as if the tenant was not likely to be turned out at the end of a year; you must assume a certain fixity of tenure, that he probably will not be dispossessed at the end of the year;

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if there is a covenant under which he is bound to go out at the end of three years, that may be considered as reducing the value of the hereditament. Unless you proceed on that principle, there are many hereditaments as to which you could not get a rateable value at all. Take, for instance, a railway. If a tenant expected to be turned out at the end of a year, it would not be worth his while to procure rolling stock, and it would not be possible for him to establish the railway. The rateable value is not to be ascertained upon the hypothesis that he will be turned out at the end of a year. But when, in the case which I have mentioned, the covenant comes into operation, and the house is pulled down at the end of the third year, and there is no house there, what is the rateable value in the fourth year? There would be none. There would be no house there, and the cause of there being then no house there existed at the date of the quinquennial valuation. It cannot be, therefore, that the existence of the cause at that date is conclusive of the matter. Further, you must introduce this consideration, as matter of common sense, that you cannot be mathematically accurate in these matters; you must deal with them as best you can. I agree that, if there be a cause existing at the time of the quinquennial valuation whose effect can be fairly measured over the period of five years, it may be quite right to say that the overseers ought to take that into account, and fix the value accordingly; and the mere fact that it produces this effect from time to time during the five years will not necessarily bring the case within s. 47. But, if you have a cause whose operation it is impossible for any human being to estimate with any certainty over the period of the next five years, it appears to me that, when that cause demonstrates its effect by large and permanent diminutions of traffic arising during the period over which the quinquennial valuation is to extend, then you have a cause which comes within the expressions used by Lord Halsbury as being "an alteration of circumstances" which affects the particular hereditament so as to reduce its value. Let me shew what I mean in saying this. When tube railways were first introduced, many people were much

afraid of them; nobody knew for certain whether they might not prove to be dangerous by reason of the possibility of explosions or other accidents. There were many things which might have discouraged the public from travelling in them; and, if so, the tube railway might have turned out not to be really an efficient instrument of competition. The reverse has proved to be the fact, and they do carry passengers very largely. That being so, it appears to me that the railway companies are entitled during the quinquennial period to say that they are in a position to shew that they have not received a proper allowance for the vast and increasing diminution of traffic to which they are exposed by this competition; that they are prepared to shew an altered state of circumstances, and a diminished earning power in their undertakings, and are therefore entitled to a reduction in their assessment.

Upon these grounds I think that the assessment committee ought to have dealt with this matter in a different manner from that in which they have. It appears to me that they took upon themselves to adjudicate upon it, and adjudicated upon it wrongly. I think that the introductory words of s. 47 are satisfied and the conditions precedent to the operation of that section are fulfilled; and therefore the duty which it imposes is that which is defined in s. 13 of the Act, and to which effect is given by the mandamus which has been directed to issue. For these reasons I think that the appeal should be dismissed.

KENNEDY L.J. I agree. In this case my brethren have so fully dealt with the points which have been taken in argument and given their reasons for affirming the judgment of the Divisional Court, in which I entirely concur, that there is very little which I can usefully add. The judges in the Court below have all of them given expression to the feeling of difficulty which they had in dealing with the case and in arriving at the conclusion to which they came. I am far from saying that there are no difficulties in connection with the case, but I must confess that, having had the advantage of reading

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their judgments and hearing the arguments of counsel on this appeal, I do not feel much doubt in coming to the same conclusion. My view is substantially the same as that expressed by Bigham J. I think that the mandamus ought to go, because in effect what the assessment committee has done is to come to a wrong conclusion in law, namely, that the introductory words of s. 47 which require that the hereditament shall be "from any cause increased or reduced in value" were not satisfied. I think that, upon the evidence before them, that was a wrong conclusion of law, and therefore the mandamus ought to issue. I am disposed to think that, if the assessment committee had arrived at the conclusion, purely as one of fact, that the alleged reduction of value had not been shewn to their satisfaction, they would have been entitled to come to that conclusion as the authority appointed by the statute to deal with questions of fact, and the Divisional Court could not have reviewed their decision upon an application for a mandamus to compel them to do something which would only have been justified by their arriving at an opposite conclusion of fact. But, as I have said, I think they came to a wrong conclusion of law, and that their action in this respect ought to be corrected in favour of the prosecutors by a mandamus ordering them to do what, under the circumstances, they would, if they had taken a right view of the law on the subject, have done without being ordered. In the argument for the appellants objection was taken to the expression "prima facie case" used in the judgments in the Divisional Court. I think that this expression was not incorrectly used in those judgments as regards the nature of the proof required, if it was used as meaning evidence sufficient to establish the fact alleged by the applicant to the assessment committee, unless the effect of it were nullified by evidence or admissions to the contrary. It appears to me that, if the assessment committee wished to avoid the effect of the evidence laid before them —I mean of course "wished" in the correct and complete performance of a public duty—they should have made such inquiries and endeavoured to elicit such further facts as might have the result of modifying or negativing the prima facie effect of that evidence. It is in the sense which I have indicated that I think

the expression "prima facie case" was used in the Court below, and in that sense I think it was accurately used. In this case the facts were, as I think, not in dispute and shewed that there was not a mere temporary deficiency, but a continuous falling off in the receipts of the railways caused by the tramways, tube lines, and motor omnibuses in the neighbourhood, which, though they existed at the time of the last quinquennial valuation, had gone on producing increased effect and reducing the railway companies' receipts since that time. I entirely agree with my brother Buckley in the criticisms which he has made upon the arguments used by the appellants as to the nature of the causes which have produced the diminution of the receipts of the railway companies. I agree with him that they are causes which come within the preliminary words of s. 47. I do not propose to deal with the authorities on the subject, as they have been already sufficiently discussed. I was at first struck with the view that some of the authorities relied on by the prosecutors were cases which related to a supplemental and not a provisional list; but the case of *Reg.* v. *Assessment Committee of St. Mary, Islington* (1), is strictly in point, as it turned upon s. 47, and not on s. 46, and I am not prepared to overrule that case, which seems to me to have been rightly decided.

Appeal dismissed.

Solicitor for appellants, *J. A. Johnson.*
Solicitor for respondents, *J. W. Watkin.*

(1) 19 Q. B. D. 529.

E. L.

C. A.

[IN THE COURT OF APPEAL.]

1908
Oct. 27, 28, 30;
Nov. 8;
Dec. 21.

SMITHIES *v.* NATIONAL ASSOCIATION OF OPERATIVE PLASTERERS AND OTHERS.

Trade Union—Procuring Breach of Contract—Trade Dispute—Strike—Breach of Contract by Workmen—Strike Pay—Procuring Continuance of Breach—Statute, whether retrospective—Trade Disputes Act, 1906 (6 *Edw.* 7, *c.* 47), *s.* 4.

The Trade Disputes Act, 1906, s. 4, is not retrospective so as to prevent the further maintenance of an action against a trade union which was commenced before the passing of the Act.

Two workmen, members of a trade union, who had respectively entered into contracts with an employer to serve him for a term of years, broke their contracts before the passing of the Trade Disputes Act, 1906, by striking, together with others in the same employ, and continuing on strike, during the currency of the periods for which they had respectively contracted to serve. The trade union had originally sanctioned the strike in ignorance of the existence of the before-mentioned contracts, but subsequently gave the workmen strike pay, after they became aware of those contracts, in order to keep the workmen out on strike:—

Held, that the trade union, by procuring a continuing breach of contract by the workmen, had rendered themselves liable in damages to the employer.

Denaby and Cadeby Main Collieries, Ld. v. *Yorkshire Miners Association*, [1906] A. C. 384, distinguished.

Where an agreement was made between a trade union and a federation of employers for the reference of disputes between employers and employed to arbitration, and a dispute had arisen between a particular employer, a member of the employers' federation, and his workmen:—

Held, that a bona fide belief on the part of the union that the employers were intending to evade a settlement of the dispute in accordance with the agreement, or even an actual intention on the part of the employers so to do, did not constitute a cause or excuse which would justify the trade union in procuring the breach by workmen of their contracts of service with the before-mentioned employer.

Question, whether knowledge of matters known to a branch of a trade union applying to the union to sanction a strike could be imputed to the union itself, discussed.

APPEAL from the judgment of Lord Alverstone C.J. in an action tried by him without a jury.

The action, which was commenced before the passing of the Trade Disputes Act, 1906, was brought by the plaintiff, who was a master plasterer carrying on business in Birmingham, for

damages in respect of acts done by the defendants in relation to a strike of the plaintiff's workmen.

The defendant association was a registered trade union. Other defendants were one Deller, the secretary of the defendant association, since deceased, one Duckett, who was the secretary of the Birmingham local branch of the defendant association, and two workmen named respectively Forrester and Ecclesby, who were members of the same branch. Other persons were also made defendants as being trustees of the property of the defendant association, but it is unnecessary for the purposes of this report further to mention them.

The claim of the plaintiff against the defendant association, and Deller and Duckett, so far as material, was, in substance, that those defendants, knowing that the two defendants Forrester and Ecclesby, who were skilled scagliola workers, were engaged to work for the plaintiff under agreements for terms of years, which, at the time of the matters complained of, had not expired, had wrongfully and maliciously induced them to break their contracts with the plaintiff. The claim against the defendants Forrester and Ecclesby was for breaking their contracts. (1)

The facts (2), so far as material for the purposes of this report, appeared to be as follows: Forrester and Ecclesby were employed by the plaintiff as skilled plasterers and scagliola workers, the former under an agreement dated December 23, 1901, for a term of five years, and the latter under an agreement dated March 5, 1904, for a term of three years. On and previously to January 17, 1905, when the strike took place, the plaintiff was carrying out several large contracts for plastering and scagliola work at and near Birmingham, and, among other places, at Barnsley

(1) There were workmen of the plaintiff other than Forrester and Ecclesby, who struck at the same time. These workmen did not appear, like Forrester and Ecclesby, to have been engaged for terms of years, but their engagements were terminable on short notice. A claim was made by the plaintiff against the defendants for procuring these workmen to strike. For the purposes of this report, however, it is unnecessary further to refer to that branch of the case.

(2) The details of the case were extremely long and complicated, and many questions of fact involved were highly in dispute. This report merely aims at giving such a sketch of the facts upon which the judgments proceeded as may render the points of law decided intelligible.

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Hall, near Bromsgrove. He had in his employ for the purposes of the latter work a foreman named Gibbs. Gibbs had formerly been a member of the defendant association, but had ceased to be so in consequence of his refusal to pay a fine inflicted upon him by the association. The plaintiff had no knowledge of the last-mentioned circumstances, or that there was any difficulty or trouble between Gibbs and the defendant association, until an interview which he had with the defendant Duckett in October, 1904. Duckett then asked the plaintiff whether he knew that Gibbs was objectionable to the association and a non-union man, and what the plaintiff intended doing about him, and the plaintiff replied that the matter rested with the association and Gibbs, and was no concern of his. At a second interview Duckett told the plaintiff that, if he continued to employ Gibbs, the defendant association would take up the matter with him.

The result of the dispute thus commenced ultimately was that the Birmingham branch of the defendant association, with the sanction of the association, called out the plaintiff's workmen, including Forrester and Ecclesby, on strike, as after mentioned.

The rules of the defendant association provided that it should "consist of as many districts as will conform to the following rules: each district to consist of as many branches as the plasterers of any city, borough, or town may consider necessary." The registered office of the association was situated in London. Each district was to be governed by councils consisting of delegates from its branches; but, if one branch was all that was required, it was to be deemed a district of the association. The objects of the association, as defined by the rules, were, in substance, to raise funds by entrance fees, weekly contributions or levies, and to apply the same for the purposes, among others, of providing certain benefits for members and of regulating the relations between workmen and employers. The general affairs of the association were managed by a central executive council, who were elected by the members of the association at large, and whose meetings were held in London. Provision was made for the appointment of branch committees for the government of the respective branches, for the making of branch rules, and for the appointment of a general secretary

and branch secretaries. The rules likewise provided for the establishment of a "general fund" out of members' subscriptions, which was to be the property of the association generally, and not of the branches to which the members subscribing respectively belonged. One of the rules (rule 26 (1.)) was as follows: "The privilege of every branch or district must be maintained, and, if at any time an employer or employers shall attempt to infringe upon the rights and privileges of any district, such infringement shall be immediately made known to the general secretary, who shall convene a meeting of the executive, and submit the question to their investigation; and they shall take such measures as they may deem most expedient for the immediate resistance of such infringement, but no district shall cause their members to cease work without the sanction of the executive. Any district not conforming to this rule shall not be entitled to the protection of the association, and, if support is required, full particulars of the case must be sent to the executive, stating the amount required, which shall be paid from the general fund: and, when any dispute takes place, the same shall be immediately made known to the general secretary, who shall call the executive council together and send their opinion to the branch within four days." Power was given to the executive by one of the rules to close a strike if they thought it necessary. Other rules provided for giving strike pay in the event of members being called upon to come out on strike, but that every effort should be made to bring about an amicable settlement prior to ceasing work; that no branch or district should cause its members to cease work without first obtaining the consent of the executive committee; and that, when a dispute took place between the employed and employers of any branch or district, the committee of the district should use their utmost endeavours to settle the matter amicably between the parties.

It appeared that, previously to April, 1904, there had been a discussion of various questions which had arisen between the employers and employed in the building and plastering trades throughout the country, which led to the execution on April 12, 1904, of an agreement, which was headed "National Agreement,

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otherwise General Rules as agreed between the National Federation of Building Trade Employers of Great Britain and Ireland, the National Association of Master Plasterers, and the National Association of Operative Plasterers." This agreement was signed by W. H. Jessop, the president, and J. A. S. Hassal, the secretary, on behalf of the National Federation of Building Trade Employers; by William Smithies, president, on behalf of the National Association of Master Plasterers; and by Daniel Hennessey, Mark Jones, and M. Deller, secretary, on behalf of the National Association of Operative Plasterers. The following are the most material clauses of that agreement:—"1. The National Association of Operative Plasterers will not take any steps to compel men regularly employed as foremen or superintendents of plasterers to become members of the National Association of Operative Plasterers, and the employers will not take any steps to compel any men to cease their membership of, or prevent them joining the operatives' society. 3. No boycotting or blacklisting shall take place by the National Association of Operative Plasterers in future, where the firms adhere to the rules mutually agreed upon, and should any firm be engaged to do any portion of plastering work, and do not pay the recognized rate of wages, it shall not be considered a violation of this agreement, should the National Association of Operative Plasterers enter a protest. The employers agree that such rules shall be strictly enforced in all parts of their contracts. 5. In the event of any dispute arising on any job or works, the district officials of the National Association of Operative Plasterers shall send written notice to the local Association of Master Builders, and Master Plasterers, who shall inform them whether the said employer is a member of either of these bodies. If so a strike shall not be sanctioned by the National Association of Operative Plasterers until six clear working days have expired from receipt of such notice, during which time the matter shall be considered by a joint committee of employers of plasterers and members of the operatives' union (such committee to be elected annually) with a view to an amicable settlement; failing a local settlement reference shall immediately be made to a standing joint committee, consisting of members of the employers' and operatives'

central bodies, and until they have met and discussed the grievance no strike or lock-out shall be sanctioned either by the National Association of Operative Plasterers or by the employers' association. With regard to the alleged refusal of members of the National Association of Operative Plasterers to work with workmen who may not belong to a trade union, it is understood the men the operative plasterers object to work with are defaulters and other men who have been shewn to the employers to have made themselves specially objectionable to the union men. 6. No employer shall be called upon to pay more than the local standard rate of wages to men engaged in a town or district where the work is being executed, and where no established rate exists, that of the nearest town or district shall be adopted."

For the purpose of the local settlement of disputes there had been appointed for the Birmingham district, under one of the local branch rules, a local conciliation committee, consisting of a committee of six employers and a committee of six operatives, who were members of the Birmingham branch of the defendant association.

The dispute which had arisen as above mentioned with reference to the employment by the plaintiff of Gibbs, with whom the members of the branch objected to work as being "objectionable" to them, was brought before this committee, which met for the purpose of dealing with it on December 1, 1904. At this meeting the objection was raised by one of the employers' representatives on the conciliation committee that the committee had not, on the true construction of the Birmingham branch rule, relating to the local settlement of disputes, jurisdiction to deal with the dispute in question as having arisen beyond the area within which they had jurisdiction; and, ultimately, the employers' representatives on the conciliation committee, after consulting together apart from the operatives' representatives, declined to deal with the matter on that ground. It appeared that the plaintiff, who was a member of the conciliation committee, though present, did not actually take any part in the determination of the matter, as being interested. In consequence of the course thus taken by the employers' representatives, considerable delay was caused while negotiations by

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correspondence and otherwise took place with regard to the question what was the proper tribunal to arbitrate on the dispute under clause 5 of the National agreement, and by what tribunal it should be settled, and various propositions were put forward on the subject. In the course of these negotiations, letters were written on the matter by, among others, Hassal, the secretary of the employers' federation; Deller, the secretary of the defendant association; Bigwood, the secretary of the Birmingham Builders' Association; and the defendant Duckett. It appears to be sufficient (1), for the purposes of this report, to state that the Lord Chief Justice found, in substance, that, as the result of what took place, there was a bona fide belief, not without some foundation, engendered in the minds of the operatives on the Birmingham conciliation and branch committees, and of the executive of the defendant association, that the employers were not really willing to have the dispute settled as provided by clause 5 of the National agreement, and were trying to evade any such settlement (2); and that the plaintiff's workmen were called out on strike, as after mentioned, by the Birmingham branch committee in consequence of that belief, with a view to enforcing such a settlement under clause 5, and not for the purpose of injuring the plaintiff or punishing Gibbs or compelling him to rejoin the union. The plaintiff's workmen, including Forrester and Ecclesby, were called out on strike by the Birmingham branch committee on January 17, 1905. The branch committee had previously applied to the executive of the defendant association to give their sanction to the strike, which they had done. The sanction so given was communicated to the branch by a letter dated January 13, 1905, from the secretary to Duckett containing the following passage: "concerning the matter of objectionables I have to inform you that the whole

(1) To set out the correspondence on the subject, and the details of the proceedings of various committees in relation to the question how the dispute should be settled, would occupy a space wholly disproportionate to any advantage that would be gained thereby. It is thought that the above statement will be sufficient for the purposes of this report.

(2) See, as to the effect of the evidence and the findings of the Lord Chief Justice on this subject, the judgment of Vaughan Williams L.J., post, p. 330; that of Buckley L.J., post, p. 336; and that of Kennedy L.J., post, p. 340.

of your committee's actions have been endorsed, including final resolutions to withdraw on the expiration of six days from the 11th." It appeared that, when the executive of the defendant association so sanctioned the strike, they did not know of the contracts which Forrester and Ecclesby had entered into, by reason of which they could not, like other workmen concerned, give notice to terminate their contracts by January 17, and therefore could not strike on that date without breaking their contracts. In the opinion of the Court of Appeal, however, the result of the evidence appears to have been to shew that the Birmingham branch had notice of Forrester's contract on January 14, before the plaintiff's men were called out, and that the executive of the defendant association had by January 21 knowledge of both Forrester's and Ecclesby's contracts. (1) Subsequently to the last-mentioned date the executive committee gave strike pay to Forrester and Ecclesby in order to keep them on strike.

The Lord Chief Justice came to the various conclusions of fact and law which, in substance, will be found set out in the judgment of Vaughan Williams L.J. (post, pp. 326-328), one of those conclusions being that the defendant association had ratified the action of the branch in calling out the plaintiff's workmen, including Forrester and Ecclesby, and therefore, if the action of the branch in so doing was wrongful as against the plaintiff, the defendant association was liable for it; but he held, in substance, that, inasmuch as there was a bona fide belief on the part of the committee of the Birmingham branch and the executive of the defendant association that the employers were intending to avoid a settlement of the dispute in accordance with clause 5 of the National agreement, and they therefore caused the strike bona fide with a view to bringing about such a settlement, there was a sufficient cause to justify their conduct in the matter, which did not therefore give rise to a cause of action in favour of the plaintiff. He accordingly gave judgment for the defendant

(1) See the judgment of Vaughan Williams L.J., post, pp. 330, 331, and the judgment of Buckley L.J., post, pp. 333-335, as to the time at which the Birmingham branch committee were affected with knowledge of Forrester's and Ecclesby's contracts, and the effect of such knowledge by them.

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association, but gave judgment for the plaintiff for 25*l.* damages for breach of contract as against Forrester and for a similar amount as against Ecclesby. (1)

On the appeal coming on, the preliminary objection was taken that the passing of the Trade Disputes Act, 1906, was a bar to the further maintenance of the action. This point was taken and overruled by the Lord Chief Justice at the trial.

Oct. 27. *Montague Lush*, K.C. (*McCardie* with him), for the plaintiff. The defendants contend that the Trade Disputes Act, 1906, s. 4, was a bar to the further maintenance of the action, but that enactment cannot have the retrospective effect for which the defendants contend. There was a vested cause of action in this case, and the action had actually been commenced, long before that statute was passed. It never could have been meant to divest an existing cause of action under such circumstances as these. It is a well-established principle that an Act is not to be construed retrospectively so as to divest existing rights, unless its terms expressly or by clear implication involve such a construction : *Gardner* v. *Lucas*. (2) The ground of the decision in *Pardo* v. *Bingham* (3) was that the statute there dealt with a matter of practice and procedure in which there was no vested right. [He cited Dwarris on Statutes, 2nd ed. p. 540; Maxwell on the Interpretation of Statutes, 3rd ed. pp. 322, 333.]

Shearman, K.C. (*Ernest Wild* with him), for the defendant Duckett. It can hardly be contended that the Trade Disputes Act, 1906, s. 4, is a declaratory enactment, but the object of it was to make the law that which it was always supposed to be before *Taff Vale Ry. Co.* v. *Amalgamated Society of Railway Servants* (4) and to give to trade unions and their officials as representing them that immunity from such actions as these which they had in fact always enjoyed before that decision. It is submitted that the words of s. 4 of the Trade Disputes Act, 1906,

(1) It has not been thought necessary to encumber the statement of facts with the facts which were specially applicable to the claim against the defendant Duckett, as they did not involve any point of law distinct from those raised by the case against the defendant association.

(2) (1878) 3 App. Cas. 582.

(3) (1869) L. R. 4 Ch. 735.

(4) [1901] A. C. 426.

forbid the Court from continuing to entertain an action of this kind after the date of the passing of the Act, just as much as they forbid the original entertainment of it after that date.

Clement Edwards (*Simon, K.C.*, with him), for the defendant association.

VAUGHAN WILLIAMS L.J. We are all agreed on this point. It is a proposition founded in common sense that, where vested rights have already accrued, and legislation is passed which uses words expressive of futurity, such as "shall" or "shall not," which prima facie would appear to be meant to be applicable to future cases, it is not to be construed retrospectively so as to affect those vested rights, unless terms are used which clearly compel the Court to give it that construction. This is only to impute common sense to the Legislature; any reasonable person would say that clear terms ought to be used, if it is intended to divest a vested right. It is stated in Maxwell on the Interpretation of Statutes, 3rd ed. p. 333, that, where a statute is in its nature a declaratory Act, the argument that it must not be construed so as to take away previous rights is not applicable. I suggested to Mr. Shearman that he might base an argument on this passage, but he did not receive the suggestion with enthusiasm. I am clearly of opinion that the Trade Disputes Act, 1906, s. 4, is not declaratory so as to prevent the general rule against construing a statute retrospectively from applying. It is impossible, I think, to suppose that the Legislature meant that, where an action was already commenced, the passing of the Act should stop it. I think that on this preliminary point the Lord Chief Justice was quite right.

BUCKLEY L.J. I am of the same opinion. Before the passing of the Trade Disputes Act, 1906, the plaintiff brought an action which he was entitled to bring. The Court was entitled, and indeed bound, to hear it, for that is the purpose for which the Courts sit. The action went on a preliminary question to the House of Lords. (1) Then this Act of Parliament was passed; it contains the words "an action against a trade

(1) [1906] A. C. 434.

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union . . . . shall not be entertained." The respondents say that these words are equivalent for the purposes of this case to "shall cease to be entertained." I do not agree with that contention. It involves that an action is to be treated as though there were no action at all, although costs had already been incurred before the Act was passed. The section cannot possibly bear such a construction.

KENNEDY L.J. I agree, and have nothing to add.

Oct. 28, 30; Nov. 3. *Montague Lush*, *K.C.*, and *McCardie*, for the plaintiff. The Lord Chief Justice did not find that there was an actual intention on the part of the employers to break the National agreement of 1904, but only that the defendants bona fide believed that they had such an intention. Even if the employers had an intention to break that agreement, that could not be a just cause or excuse which would justify the union in procuring the plaintiff's workmen to break their independent contracts with the plaintiff. Those contracts were wholly different from and independent of the National agreement. The evidence does not shew that the employers were really repudiating the National agreement, but only, at the utmost, that they were mistaken as to the effect of the local branch rule.

The branch was by the rules made the agent of the defendant association to declare a strike; or, if not, nevertheless, when the defendant association delegated to the branch the power of calling the men out on strike, and so made it their agent for that purpose, as they did, they became responsible for what the branch did with knowledge that it was thereby procuring a breach by Forrester and Ecclesby of their contracts, even if the defendant association had no such knowledge themselves. Under the circumstances the knowledge of the branch became the knowledge of the defendant association.

Further, the defendant association had become aware of Forrester's and Ecclesby's contracts on January 21, 1905, and, by keeping them out on strike by payment of strike pay after that date, they adopted and became responsible for what the branch had done. There was a continuing breach of their

contracts by Forrester and Ecclesby, which the defendant association wrongfully procured.

There was nothing in this case which could in law amount to a justification of the action of the defendant association in procuring Forrester and Ecclesby to break their contracts with the plaintiff. The contract of the masters as contained in the National agreement was wholly independent of the plaintiff's contracts with Forrester and Ecclesby; and, even if the employers did break their contract, it could not be an excuse for procuring Forrester and Ecclesby to break theirs. The only case in which the procuring of a breach of contract can be justified is where the contract procured to be broken is one which in itself constituted an infringement of the rights of the party so procuring its breach, as, for instance, where the vendor who has entered into a contract for the sale of land to one person subsequently enters into a contract for sale of that land to another person in derogation of the first vendee's rights. [They cited *Read* v. *Friendly Society of Operative Stonemasons* (1); *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland* (2); *Quinn* v. *Leathem* (3); *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (4); *Allen* v. *Flood* (5); *Bawden* v. *London, Edinburgh and Glasgow Insurance Co.* (6)]

Simon, K.C., and *Clement Edwards*, for the defendant association. As regards the plaintiff's claim against the defendant association for procuring breaches of contract by Forrester and Ecclesby, in the first place it was not shewn that the defendant association did procure such breaches of contract. They did not know anything about Forrester and Ecclesby, and the contracts made by them, until after the strike had taken place. It was held in *Denaby and Cadeby Main Collieries, Ld.* v. *Yorkshire Miners' Association* (7) that, in the case of a trade union with branches and rules similar to those of the defendant association, a branch was not the agent of the union in bringing about a wrongful strike. The sanction by the defendant association of

(1) [1902] 2 K. B. 88, 732.
(2) [1903] 2 K. B. 600.
(3) [1901] A. C. 495.
(4) [1905] A. C. 239.
(5) [1898] A. C. 1.
(6) (1892) 2 Q. B. 534.
(7) [1906] A. C. 384.

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the strike under the rules does not import that they thereby authorize the branch to commit wrongful acts in bringing about a strike. When this strike was sanctioned by the union, they knew nothing of Forrester's and Ecclesby's contracts, and the sanction given must be taken to be a sanction of a strike involving no illegal or wrongful act on the part of the strikers. "Authorizing a strike" does not mean authorizing the workmen to break their contracts, but merely to give the proper notices to determine their engagements, and, when those have expired, to come out on strike. The branch not being the agent of the defendant association to call the men out, the knowledge of the branch when they did so cannot be imputed to the defendant association when they sanctioned the strike. It was held in *Denaby and Cadeby Main Collieries, Ld.* v. *Yorkshire Miners' Association* (1) that giving strike pay to the miners who had wrongfully struck, after they had struck, did not amount to a ratification of the tort or give any cause of action. There is no evidence that the plaintiff would have been willing to take Forrester and Ecclesby back again into his employ after the strike had commenced.

Secondly, the authorities shew that there may be a just cause or excuse which justifies the procurement of a strike, even if it involves a breach of contract by the workmen, and whether there is such a just cause or excuse must depend on the circumstances of the particular case: see *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland* (2); *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (3); *Read* v. *Friendly Society of Operative Stonemasons.* (4) In this case the facts shew, and the Lord Chief Justice has in effect found, that the employers on the conciliation committee, of whom the plaintiff was one, were trying as a body to break away from the provisions of the National agreement with regard to settlement of disputes, or, at any rate, the Lord Chief Justice has found that the branch and the union had a reasonable belief that the employers were going to do so, and that the men were called out, not for the purpose of injuring the plaintiff or

(1) [1906] A. C. 384.
(2) [1903] 2 K. B. 600.
(3) [1905] A. C. 239.
(4) [1902] 2 K. B. 732.

punishing Gibbs or compelling him to become a member of the association, but bona fide with the object of enforcing the arbitration clause in the National agreement and compelling the employers to abide by the provisions of that agreement as to the settlement of disputes, which had been framed in the interests both of employers and employed throughout the country. Under those circumstances the action of the defendant association did not bear anything of a wrongful or malicious character. The provisions of the National agreement, of which the plaintiff was a signatory, may be regarded as incorporated into and as forming part of the contract made by the plaintiff with his own workmen. If that be so, it is a case of a breach of an agreement by one party where the other party is repudiating, or is reasonably supposed to be repudiating, an essential stipulation of the same agreement. It is submitted that, under such circumstances as existed here, the course taken by the defendant association gave no cause of action to the plaintiff against them. A trade union is a legitimate organization for the purpose of advising its members what their course of action should be with regard to their employment and its conditions; and it is submitted that, if the union bona fide and without any personal malice or indirect motive advises them to take a certain course in their own interests, and there is a just and reasonable cause or excuse for the course of action suggested, such as existed in the present case, the union commits no wrongful act against the employer, even although that course of action involved a breach of contract by the workmen. The authorities shew that there may be such a just and reasonable cause or excuse though they do not define it: see *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (1); *Giblan* v. *National Amalgamated Labourers' Union of Great Britain and Ireland.* (2) In *South Wales Miners' Federation* v. *Glamorgan Coal Co.* (3) it was held that the particular cause or excuse put forward by way of justifying the action of the defendants was insufficient, but the case does not shew that there cannot be such a justification.

(1) (1889) 23 Q. B. D. 598, at p. 613; [1892] A. C. 25.

(2) [1903] 2 K. B. 600, at p. 618.

(3) [1905] A. C. 239.

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Shearman, K.C., and *Ernest Wild*, for the defendant Duckett.

Montague Lush, K.C., in reply.

Cur. adv. vult.

Dec. 21. VAUGHAN WILLIAMS L.J. read the following judgment:—This is an appeal by Mr. Smithies, a master plasterer, against the decision of the Lord Chief Justice sitting without a jury.

The action was brought by the plaintiff against the National Association of Operative Plasterers and also against Mr. Duckett, the secretary of the Birmingham local branch of the association, and also against two workmen, John Forrester and William Henry Ecclesby, skilled scagliola workers, who had engaged to work for the plaintiff under agreements for terms of years which, at the time of the acts of the defendants complained of, were still running. Besides the association and Duckett and the two scagliola workers, Forrester and Ecclesby, above mentioned, who were members of the Birmingham branch of the association, there were other defendants, Michael Deller, the secretary, now dead, and Stephen Wall, John Ponsford and John Deer, trustees of the property of the National Association, but no question arises in this appeal with reference to the last-mentioned defendants.

The writ in the action was issued against the association before the passing of the Trade Disputes Act, 1906.

The association is described in the statement of claim as a registered trade union association. The point was raised on behalf of the association that, it being a registered trade union, the Court after the passing of that Act could not entertain the action. This preliminary point was overruled by the Lord Chief Justice at the trial, and in the course of the hearing of this appeal we have affirmed his decision, being of opinion that the Trade Disputes Act is not retrospective.

The claim of the plaintiff against the defendant association and the defendants Deller and Duckett, acting on their own behalf as well as on behalf of the said association, was that the defendants, well knowing that Forrester and Ecclesby had agreed to work for the plaintiff for the said terms of years, and that Duckett had threatened on behalf of the defendant association

and Deller that if the plaintiff did not forthwith discharge one Gibbs the association would take up the matter against him, wrongfully and maliciously, and with the object of compelling the plaintiff to discharge Gibbs, procured Forrester and Ecclesby and certain other workmen to break their contracts. The defendants Forrester and Ecclesby were sued individually in respect of their breach of contract. They were not called. They broke their contracts, acting, the Lord Chief Justice said in his judgment, in obedience to the orders of the union, and judgment has been given against each of them for the sum of 25*l.* with costs, to be taxed on the county court scale. Against all the other defendants the action was dismissed with costs.

The plaintiff has appealed. There is no cross-appeal, except that on behalf of the association an appeal was raised on one point by a letter from the defendants' solicitors to the plaintiff's solicitors dated June 25, 1908, which runs thus: "Dear Sirs: Smithies and the Plasterers' Association. Having regard to the fact that the decision of the Lord Chief Justice on the trial of this action was wholly in favour of the defendants, it is of course not necessary for us to give any notice as to a cross-appeal, notwithstanding that our clients did not agree with the findings, &c., of the Lord Chief Justice upon the question of ratification, but in order that you may be under no misapprehension we beg to give you notice that upon the hearing of your appeal herein we shall if necessary contend: (*a*) That the finding of the Lord Chief Justice upon the question of ratification was unsupported by evidence. (*b*) Alternatively that his decision on this matter was against the weight of evidence. (*c*) That there was no ratification in law by any of the defendants. We shall also contend that, having regard to the Trade Disputes Act of 1906, the Court has no jurisdiction to entertain your appeal."

The substantial points argued before us have been on the question of (*a*) the responsibility of the union for the calling out of the men or the inducing Forrester and Ecclesby to remain out with knowledge that they were breaking their agreements; (*b*) the responsibility of Duckett, the secretary of the Birmingham branch, which branch is not a defendant in this action.

It was argued that, having regard to the constitution of the

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union as established by its rules, which appear in the rules of 1904, the union, the central body, stood to the branch in the relation of principal and agent, or that the branch was a constituent part of one central body—that is to say the union, that is the defendant association—so that the action and knowledge of the branch would be the action and knowledge of the central body. I am of opinion that this contention cannot be justified.

I think that there is nothing in the rules of the National Association of Operative Plasterers or their constitution to prevent the reasoning of Lord Loreburn in the case of *Denaby and Cadeby Main Collieries, Ld.* v. *Yorkshire Miners' Association* (1) applying to the present case. The House of Lords in that case held that the branch officials were not as such officers or agents of the central body, but in my judgment the decision in the House of Lords in no way exonerates the central body from responsibility, if a central body in fact orders or authorizes the branch officials wrongfully to withdraw men from their employment.

Now I propose in the first instance to set forth the findings of fact of the Lord Chief Justice, and to discuss the question whether the defendants, the central body, did give to the officers of the branch such directions as to render the central body responsible, in case it is established either that the calling out of the men, or the inducing the men who had come out to stay out, was wrongful.

The findings of fact of the Lord Chief Justice were the following: (1.) That in the month of July, 1903, Gibbs was expelled from the union and from that date ceased to be a member. (2.) That the plaintiff prior to an interview with Duckett in October, 1904, had no knowledge of any trouble or difficulty between Gibbs and the defendant association. (3.) That at the said interview Duckett asked the plaintiff whether he knew that Gibbs was objectionable to the association and a non-union man, and what he, the plaintiff, intended doing about him, and that the plaintiff replied that the matter rested between the association and Gibbs and was no concern of his. (4.) That the Lord Chief Justice was not satisfied that the action of the

(1) [1906] A. C. 384.

Birmingham branch during the months of November and December, 1904, was not bona fide in order to obtain a decision under clause 5 of the agreement, or that the men were using the occasion for unfairly interfering with Gibbs and the other men working at the plaintiff's, or that the defendants were endeavouring to force Gibbs to rejoin the National Association of Operative Plasterers. (5.) That the defendant association and the Birmingham branch did sanction the men being called out, believing that for the purpose of bringing about a settlement they were acting within their rights after having given six clear days' notice under clause 5 of the agreement of April 12, 1904, between the masters and operatives in the building and plasterers' trades. (6.) That the local rules did apply to the dispute in this case so that the local conciliation committee could deal with it, and that the Lord Chief Justice was satisfied that there was an apprehension in the minds of the operative members, rightly or wrongly, that the masters might endeavour to get out of the said agreement, and found as a fact that by December 30 the operatives had formed the impression, not without some foundation, that the masters were not willing to deal with the case under article 5 of the said agreement, and were thinking that the masters were trying to delay. (7.) That, even if the six days' notice provided under clause 5 of the said agreement mentioned in the notice of January 11 did not expire until the 17th or 18th, the strike was not unlawful under article 5, because the men came out on the 17th, the matter having been really pending since November 28, 1904. (8.) That the determination by the masters that under the Birmingham and District Building Trade Rules the conciliation committee had no power to deal with the question that had arisen was ill founded and wrong. (9.) That Duckett did not know of Forrester's agreement until the evening of January 17, nor even then know of Ecclesby's agreement, and that there was no evidence that the late Mr. Deller, or any one representing the defendant association, knew of these agreements until the receipt of the plaintiff's solicitors' letter to Duckett dated January 19, which was forwarded to Mr. Deller upon the 21st. (10.) That the agreement of April, 1904, was made for good consideration

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and bound masters and men. (11.) That the defendant association in sanctioning the strike were ignorant that any of the men (for instance, Forrester and Ecclesby) were bound by contract, and that the existence of the agreement of 1904, and the express reservation therein of the right of the men to object to work with defaulters and the neglect of the masters to allow the dispute which had arisen to be settled pursuant to the terms thereof, justified the defendants in sanctioning the strike. (12.) That the members of the association and the Birmingham branch bona fide believed that the masters were endeavouring to avoid having the dispute settled under clause 5 of the agreement, and that they called the men out, not with a view of getting any contracts broken, but because they could not get the dispute settled in the manner contemplated by the agreement. (13.) That the statement of Duckett and other witnesses that, had the decision of the conciliation board respecting Gibbs and the other defaulters been against them, they would have acted upon it without further objection is true. (14.) That the central association, that is, the defendant association, authorized and sanctioned the men being called out on January 17, (no doubt in ignorance of the existence of the agreements between the plaintiff and Forrester and Ecclesby) and therefore, if the act of the Birmingham branch gave rise to a cause of action, "in my judgment the defendant association is responsible." (15.) That the defendant association did ratify the action of the Birmingham branch after they knew that Forrester and Ecclesby had been under agreements, and continued to pay strike pay, and that the defendants and the Birmingham branch discussed the strike after January 19. (16.) That the defendant association allowed Forrester and Ecclesby to remain out, with knowledge that they were breaking their agreements.

But the Lord Chief Justice, having found these facts, including the facts as to ratification, held that, as the action of the association and the Birmingham branch up to January 17 was bona fide with a view to bringing about a settlement under clause 5, and as the men were called out under the power recognized by the agreement in the event of the men failing to obtain a settlement of their grievances as to working with defaulters, the ratification

was not sufficient to enable the plaintiff to recover against the defendant association on the ground that they wrongfully induced Forrester and Ecclesby to break the agreement.

Now I want to say at this point that, agreeing as I do with the finding of the Lord Chief Justice as to the conduct of the defendant association, which he calls "ratification," I do not think this term quite accurate. I think that the defendant association assisted in supporting the Birmingham branch in encouraging the scagliola men to stay away, although they knew that the scagliola men were guilty of a breach of contract in staying away. I consider that a wrongful act, but I do not think that the word "ratification" is an accurate term to use in respect of it; but, apart from that, I wish to say this as to the justification which the Lord Chief Justice adopts in respect of this act, whether it is properly called "ratification" or not, that with all deference I cannot entirely agree with this conclusion of the Lord Chief Justice. I cannot agree that the agreement recognizes a power in the defendant association, or in the branch, in the event of the men failing to obtain a settlement of their grievances as to working with defaulters, to call out the men at a date when the consequence would be that some of the men by coming out at that date would necessarily break the agreements under which they were employed, even if there had been a failure to obtain a settlement under clause 5 through no fault of the men, of which I am by no means sure. Nor do I think that the judgment of Lord Collins in *Read* v. *Friendly Society of Operative Stonemasons* (1) recognizes that under circumstances like those in the present case there may be a justification even for inducing people to break their contracts. The Lord Chief Justice, after referring to the judgment of Lord Collins, says: "But so far as it is for me, in my opinion, a refusal by the masters to refer to arbitration a question which they and the workmen had specially agreed should be so dealt with, might justify them, acting bona fide under clause 5, even though the consequence might be that some agreements might be broken." I suppose this means, so far as it is applicable to ratification, that, if the men were called out in the honest belief that the masters had refused to refer to

(1) [1902] 2 K. B. 732.

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arbitration a question which they and the workmen had specially agreed should be so dealt with, the defendant association might ratify the action of the Birmingham branch and continue strike pay after they knew that Forrester and Ecclesby had been under agreements such as those in this case. I cannot agree. The Lord Chief Justice does not find as a fact that there was any such refusal by the masters; on the contrary, he says, "I find as a fact that by December 30 the operatives had formed the impression, not without some foundation, that the masters were not willing to deal with the case under article 5 of the agreement, and were thinking that the masters were trying to delay." And I do not think that this honest belief would justify either the action of the Birmingham branch or the ratification by the defendant union if, at the time respectively of the action of the branch or the ratification by the defendant association, there was knowledge of the terms of the engagement of Forrester or Ecclesby. Although I have mentioned that the Lord Chief Justice does not find refusal by the masters, I should have arrived at the same conclusion even if the masters had in fact refused to arbitrate.

As to the knowledge of the Birmingham branch, I think that the branch had this knowledge on January 14, three days before the 17th, the day on which the men were called out, and that the defendant association also had this knowledge before the ratification, as indeed is found by the Lord Chief Justice in his judgment. My conclusion as to the knowledge of the branch is based on this, that the men's section of the masters' and men's conciliation committee was in fact a committee of the branch, and in my opinion the knowledge of this committee of the branch is the knowledge of the branch itself.

The conclusion which I have arrived at, if right, is sufficient to dispose of this case, and in no way conflicts with the judgment of the House of Lords in the case of *Denaby and Cadeby Main Collieries, Ld.* v. *Yorkshire Miners' Association* (1), because in that case the masters, before the union approved and supported the action of the men, insisted on new terms of employment as a condition of taking the men back. It was urged before us that the judgment of Lord Collins is an authority for the proposition

(1) [1906] A. C. 384.

that you can excuse procuring a man to break his contract; and it was said that occasionally the Court or a judge restrained a man from performing his contract, but, as Mr. Montague Lush pointed out, these injunctions only go to restrain a contract which ought never to have been made.

I should like, however, before finishing my judgment, to say a few words as to the knowledge of the defendant association on January 17, the day on which the men were called out, for I have had some doubt as to whether for this purpose the knowledge of the branch was the knowledge of the defendant association. No doubt, when the knowledge of an agent is the knowledge of something material to the particular transaction, and something which it is the agent's duty to communicate to his principal, the principal will be affected by such knowledge, and, if it is the agent's duty to make the communication, his principal is affected with notice, whether the communication was in fact made or not. But I have to consider in the present case whether the fact that the branch was asking the union to sanction the strike makes the union and the branch stand either in the relation of principal and agent, or in such relation that the duty to communicate would justify the imputation of the knowledge of the branch as the knowledge of the defendant association. I have grave doubts as to this. It is quite clear that the relation is not that of principal and agent. The case seems to be that, two bodies having a common object, the one engages with the other that it will not take a course which will in all probability throw an obligation to make money payments for maintenance on the other body without the sanction of that other body. It is, of course, plain that the body asking for the sanction is bound to make full disclosure of all material facts, especially in a case in which the course for which sanction is asked is a course which, if taken without sufficient cause, may damage third persons and possibly throw liability on both the body asking the sanction and the body giving its sanction. But the general proposition that, where a person asks for sanction and it is given, the person giving it must have imputed to him all the knowledge of the petitioner seems to me too wide.

Hitherto I have only dealt with the case against the defendants

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other than Duckett. The case against Duckett depends on his knowledge of the scagliola contracts. He says that he did not know of these contracts, and the Lord Chief Justice has found that until January 17 he did not know. I do not see my way to differ from the Lord Chief Justice, who saw and heard the witnesses as to this question of fact.

BUCKLEY L.J. read the following judgment:—The field in this case is so large as that it is neither desirable nor useful to endeavour to cover the whole ground again in a second judgment. I shall endeavour to compress what I have to say under what seem to me to be the four principal heads in the case, namely, (1.) knowledge; (2.) ratification, if that be the right word; (3.) liability; and (4.) justification.

First as to knowledge: It is essential at the outset to form an opinion as to the position occupied by the conciliation committee of the operatives. It is a body which owes its existence to rule 11 of the Local Birmingham Trade Rules of Operative Plasterers dated April 1, 1904. That rule provides for a board of conciliation to consist of six employers and six workmen. It does not define how the members of this board of conciliation are to be elected. The rules of the National Association of Operative Plasterers provide for committees, but not in so many words for this conciliation committee. There is nowhere any definition of the mode of its election. As matter of fact, as appears by the book containing the minutes of the Birmingham branch, the resolutions for the election of the conciliation committee of workmen and the minutes of the proceedings of that committee are alike included in the book which records the proceedings of the Birmingham branch. The six workmen to serve on the conciliation committee were in point of fact appointed at a meeting of the branch. Further, I find that the conciliation committee, at their meetings, were dealing with business which was business of the branch, and I find that in the minutes of the executive council of the union in London the communications from and acts of the conciliation committee are treated as being communications from and acts of the branch. In my opinion the workmen's conciliation committee was, for

all purposes material to the present case, a committee of the branch.

Looking at the judgment of the Lord Chief Justice it is obvious that he was of the same opinion, for many passages may be pointed to in the judgment in which he speaks of acts which were in fact done by the conciliation committee as having been done by the branch. Notably he says at p. 236 (1) that he finds as a fact that the defendant association and the Birmingham branch did sanction the men being called out. This sanction was in fact, so far as the branch was concerned, given by the conciliation committee. Holding, therefore, as I do, that the workmen's conciliation committee was a committee of the branch, that committee had on January 14 knowledge of Forrester's agreement, and knowledge by the conciliation committee was, I think, knowledge by the branch.

It is necessary next to determine what were the relative positions of the union and the branch. Rule 1 provides that the association shall consist of districts, and each district may consist of branches. The branch is not the association domiciled for local purposes in a locality, but is what I may call (borrowing an expression from another branch of the law) a subordinate integer, and exists as a member of the association. The branch, under the rules, is in certain respects unable to act without the sanction of the association, and is the body from whom the association is entitled to receive information to guide the association in determining whether to give or refuse sanction. Thus it is provided by the rules, rule 26 (1.), that no district shall cause its members to cease work without the sanction of the executive; rule 26 (4.) contains a power in the executive council to close a strike; rule 27 (2.) provides that no branch or district shall cause its members to cease work without first obtaining the sanction of the executive council, as per rule 26 (1.). The effect of the rules is, I think, that the branch stood towards the union in such a position as that the branch was a member of the union, which owed to the union the duty of communicating

(1) This reference and the subsequent references to the Lord Chief Justice's judgment are to a printed transcript of the shorthand notes of the trial.

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to them all material facts within their knowledge relevant to the question whether the union should or should not sanction a strike. If the branch, with the sanction of the union, declared a strike, such knowledge as the branch at that time had of facts material to the strike is, I think, for purposes of liability, to be attributed to the union. The branch had during December (see the minutes of the executive council of, for instance, December 1, 1904, and December 15, 1904) been in communication with the union upon the question of the strike, and the union had resolved to support the branch. Under these circumstances it was, in my opinion, the duty of the branch to acquaint the union with the fact, which the branch by its committee knew on January 14, 1905, that Forrester had an agreement with Mr. Smithies. The union had, moreover, after receipt of Duckett's letter of January 11, which stated an intention to strike on January 17, resolved to "endorse the action reported," that action being to withdraw on the expiration of six days' notice from January 11, if not amicably arranged in the meantime. This was communicated to the branch by the letter of January 13. That letter contains this passage: "Concerning the matter of objectionables I have to inform you that the whole of your committee's actions have been endorsed including final resolutions to withdraw on the expiration of six days from the 11th." The union had thus delegated to the branch or given to the branch authority to strike in the event named. In this state of facts the knowledge of the branch on January 14 was, I think, the knowledge of the union for all purposes of liability of the union in the matter of the strike. The facts upon this part of the case differentiate the present case from *Denaby and Cadeby Main Collieries, Ld.* v. *Yorkshire Miners' Association.* (1) In that case in fact the first head with which the Lord Chancellor dealt was not knowledge, but agency; these are not necessarily the same.

But, secondly, whether I am right or not in attributing to the union knowledge on January 14, the next point is that the branch, as distinguished from the conciliation committee, had by Duckett, its secretary, on the evening of January 17, and the union by Deller, its secretary, had upon receipt of the letter of

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January 21, actual knowledge of Forrester's agreement, and also, as would appear by the letter of January 21, of Ecclesby's agreement; and after that knowledge the union maintained the strike by paying strike pay "to keep the men in a fighting humour" (see the letter of January 25), and "to succeed in the job to keep some of them away" (see the letter of February 1). In so doing the union was procuring Forrester and Ecclesby to commit continuing breaches of the contracts which bound them to serve the plaintiff for the residues of unexpired terms. This, in my judgment, was an act which cannot be justified under the judgment of the House of Lords in *Denaby and Cadeby Main Collieries, Ld.* v. *Yorkshire Miners' Association.* (1) The facts there were that the union in the first instance declared the strike illegal and entirely disapproved of it; that, subsequently, the masters were willing to take the men back, but only under new contracts of service upon new terms which the men were not willing to accept. In this state of facts the House held that the subsequent payment of strike pay did not create liability in the union. The union had disapproved the act which was wrongful and were but supporting the men in acts which were rightful. The men were not bound to make new contracts on new terms. The head-note in *Denaby and Cadeby Main Collieries, Ld.* v. *Yorkshire Miners' Association* (1) does not, I think, accurately state the result of the decision. Words require to be added. The head-note, I think, should read thus: "Where workmen strike in breach of their contracts, those who help to maintain the strike by supporting the workmen after their current contracts have expired in a refusal to enter into new contracts of service on new terms, and for that purpose give them money and counsel, are not liable to pay damages," and so on. In the present case I think there was a ratification, or rather I should prefer to say there were acts done with actual knowledge in support of the men in continuing a breach of contract, and that from such ratification or acts there resulted liability. At this point I find myself again in agreement with the Lord Chief Justice. He says at p. 239: "I find as a fact that they" (that is the union) "authorized and sanctioned the men being

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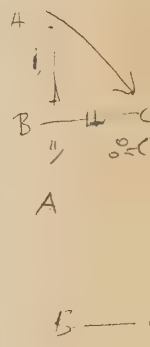
called out on January 17." I understand his next words to mean "and, although they did that in ignorance of the existence of the Forrester and Ecclesby agreements, yet, if the act of the Birmingham branch gave rise to a cause of action, the union is responsible." In my judgment the act of the Birmingham branch did give rise to a cause of action. In this I differ from the Lord Chief Justice. He assented to Mr. Simon's second contention as stated at p. 238, "that the existence of the agreement of April, 1904, and the express reservation therein of the right of the men to object to work with defaulters and the neglect of the masters to allow the dispute which had arisen to be settled pursuant to the terms thereof, justified the defendants in sanctioning the strike." To consider how this stands it is necessary to refer to the National agreement. Article 5 of the National agreement in substance provided that in case of a dispute there should be, first, a reference to the conciliation committee, and, secondly, failing a local settlement, reference should immediately be made to a standing joint committee, and that, thirdly, until they had met to discuss the grievance, there should be no strike. I accept the Lord Chief Justice's findings at p. 238, that the union and the branch bona fide believed that the masters were endeavouring to avoid conciliation under clause 5; but I also think, and the Lord Chief Justice has expressed no opinion to the contrary, that it is not made out that the masters were in fact endeavouring so to do. During the period beginning with December 1 it seems to me that the masters, while maintaining, perhaps wrongly, that the local conciliation committee had not jurisdiction, were taking the proper steps to obtain a local committee which could locally deal with the matter. Their endeavours in that direction broke down, because Mr. Hassal wrote the letter of December 21. Deller's letter of December 30 seems to me to have suggested a reasonable solution, which Bigwood entertained, but which came to nothing owing to Duckett's letter of January 11. I find no fault with the last-mentioned letter, demanding, as it did, two things, namely, first a local meeting, and, failing a local settlement, then, secondly, a reference to the joint committee. But

the meeting of the workmen's conciliation committee of January 10, which authorized that letter of the 11th, went on with a resolution that left no room for the meeting of the joint committee at the expiration of the six days. On January 17 the strike was called without any opportunity of resort to the joint committee, with the result that Forrester and Ecclesby were called upon to break, and did break, contracts which bound them towards the plaintiff to serve for a term of years. For this act the defendant union, in my opinion, are liable.

But, lastly, it is said that the act was justified. No doubt there are circumstances in which A. is entitled to induce B. to break a contract entered into by B. with C. Thus, for instance, if the contract between B. and C. is one which B. could not make consistently with his preceding contractual obligations towards A., A. may not only induce him to break it, but may invoke the assistance of a Court of Justice to make him break it. If B. having agreed to sell a property to A. subsequently agrees to sell it to C., A. of course may restrain B. by injunction from carrying out B.'s contract with C., and the consequence may ensue that B. will be liable to C. in damages for breaking it. *Read* v. *Friendly Society of Operative Stonemasons* (1) was relied on upon this part of the case. That was an action by C. against B. in my supposed parties, and C. recovered damages. Where the action is by A. against B. wholly different considerations arise. That is the present case. I have no doubt that it might be a justification (to take the facts of the present case) if the union had done no more than induce Forrester to break a contract which Smithies, having regard to the provisions of the National agreement, never ought to have made with Forrester. But this is not the contention which is raised. The contention of the defendants here is: "We were entitled to induce Forrester to break his contract with you because you had broken your contract, as contained in the National agreement, with us." This is setting up that, where there are two independent contracts, the breach of the one by the one party entitles a breach of the other by the other party. This contention, in my opinion, cannot be maintained.



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For these reasons I think that the union are liable in damages.

As regards Duckett I need not say much. The Lord Chief Justice on pp. 234 and 235 finds the facts as to the interviews between the plaintiff and Duckett to have been to the effect which the plaintiff stated. Duckett was the moving spirit in procuring the union to take the steps which they took. His means of knowledge and his knowledge in fact were as large as, if not larger than, that of the union, except that knowledge is not to be imputed to him as I think it is to be imputed to the union as stated at the beginning of this judgment, but after knowledge in fact of the contracts for unexpired terms of years he helped to maintain Forrester and Ecclesby in continuing breaches of those contracts. He, I think, also is liable. In this I have the misfortune to differ from Vaughan Williams L.J.

The result is that, while accepting all the Lord Chief Justice's findings of fact, and agreeing with him, as I do, upon the fact of ratification, I differ from him, first, upon the question of knowledge, for I think the union must be taken to have known on January 14; secondly, upon the consequence which follows upon the fact of ratification, or, as I prefer to call it, the fact that the union after knowledge of the existing contracts supported the Birmingham branch in encouraging and supporting the men in acting in breach of contract; and, thirdly, upon the question of justification. There was, I think, no justification.

I think, therefore, that the plaintiff is entitled to succeed against both the association and Duckett.

KENNEDY L.J. read the following judgment:—There can be no doubt in this case, upon the findings of fact stated in the judgment of the Lord Chief Justice, which I accept without reserve, that the Birmingham branch, with knowledge that it was thereby inducing and procuring a breach of the contracts existing between Forrester and Ecclesby and the plaintiff, called upon Forrester and Ecclesby to leave the employment of the plaintiff. There is also no doubt that the defendant association, by their letter of January 13 to Mr. Duckett, the secretary of the Birmingham branch, approved the

intention of the branch, which had been communicated to the defendant association, to withdraw the men who were members of the association from the plaintiff's employment, and that this approval was communicated without knowledge on the part of the defendant association that Forrester and Ecclesby were under special contracts with the plaintiff which could not legally be terminated by the ordinary notice. Having regard to the decision of the House of Lords in the *Denaby Main Case* (1), as I may shortly call it, and to the rules of this association, I cannot hold that the relations of the association to the branch were such as to make the acts of the branch, however illegal, the acts of the association, or such as to justify, as an inference of law, that what the branch knew the defendant association knew also. The authorization of a strike—that is what the "withdrawal of workmen" means in the letter of January 13—does not in my view necessarily imply the authorization of an illegal cessation of work. If the matter had, so far as the action of the association was concerned, stopped there, the association could not, in my opinion, properly have been held liable for the act of the branch in persuading Forrester and Ecclesby to break their contracts with the plaintiff. But it did not stop there. As the Lord Chief Justice has found as a fact, when the defendant association subsequently learnt that Forrester and Ecclesby were breaking their contracts with the plaintiff in leaving his service, as they had done under the directions of the branch given on January 14, the defendant association by paying strike pay to these men ratified the action of the branch in giving those directions, as part of the "withdrawal" of the men authorized by the defendant association in the letter of January 13. In my opinion, by the same action of giving strike pay to these men, the defendant association further, and apart from ratification, made themselves liable, because they thereby induced and procured a continuing breach of contract on the part of the men. In so holding I am, of course, not venturing to depart from the law laid down in the judgment of the House of Lords in *Denaby and Cadeby Main Collieries, Ld.* v. *Yorkshire Miners' Association.* (1) The association in that case

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gave strike pay only when the men's contract of employment had been terminated by the masters, who had refused further to employ the men except under a new contract.

So far I entirely agree with the judgment of the Lord Chief Justice. But he has held further that, although this was so, the association is not liable in damages to the plaintiff, because the conduct of the local association of master builders and plasterers, to which the plaintiff was himself a party, had been such as to justify the action of the defendant association. In April, 1904, the association of master builders and master plasterers had entered into an agreement with the defendant association for the reference of disputes to arbitration or conciliation, and the matter which led to the trouble in the present case was undoubtedly a dispute within the meaning of that agreement. The Lord Chief Justice has found as a fact that the action of the Birmingham branch and the association in regard to the strike resulted from a bona fide belief that the masters were endeavouring to avoid having the dispute settled under the agreement, and that Forrester and Ecclesby, as well as other men in the plaintiff's employment who were not, like Forrester and Ecclesby, under special contracts, were called out, not with a view of having contracts broken, but because "not without some foundation" the operatives believed that they could not get the dispute settled in the manner contemplated by the agreement. I am myself by no means sure, having regard to the language of the Lord Chief Justice at pp. 238 and 239 of the print of the judgment, that he did not mean to go further and find that in fact the master builders' and plasterers' association did neglect or refuse to abide by the agreement of 1904 in regard to the reference of this dispute under article 5 of that agreement; and the language used by the president of the masters' association on January 25, 1905, which is in evidence, appears to me rather to indicate that this was the true state of affairs.

I do not think that it matters which interpretation of the Lord Chief Justice's judgment on this point is correct. For, even if the finding was not merely that the men bona fide and not without some foundation believed that the masters were endeavouring

to evade compliance with the agreement of 1904, but that in fact the masters were so endeavouring, I am of opinion, with sincere deference to the Lord Chief Justice, that this fact is not sufficient justification or excuse in law for the defendant association ratifying the action of the branch in procuring the breach of contract on the part of Forrester and Ecclesby or for their procuring a continuance of that breach. The agreement of 1904 between the masters' association and the operatives' association and the agreements between the plaintiff and Forrester and Ecclesby were independent contracts. The breach by B. of his contract with A. cannot, I think, properly be held to justify or excuse A. in procuring C. to break an independent contract with B. Nor do I think it would make a material difference if A. be an association of which C. is a member. I do not think that the decision in *Read* v. *Friendly Society of Operative Stonemasons* (1), or anything said by Lord Collins (then Collins M.R.) at p. 737 of that case, justifies a contrary view.

In my opinion the defendant association are liable in damages to the plaintiff.

There is a further appeal in the case of the defendant Duckett, in whose favour the Lord Chief Justice gave judgment. So far as regards authorizing the calling out of Forrester and Ecclesby the Lord Chief Justice has found as a fact that at the time these men were told to leave the plaintiff's work Duckett did not know of their special agreement of service. That was a question of fact depending upon oral evidence, and I see nothing to justify a reversal of that finding. It is urged, however, by the appellant in this Court of Appeal that, even if that view be accepted, inasmuch as Duckett, who was the branch secretary, after he came to know the facts, in correspondence with Deller, the secretary of the defendant association, supported the title of these men to strike pay, and inasmuch as the allowance of such pay, when authorized by the association, passed, as I understand the facts, through Duckett's hands, he must be treated as conspiring with the defendant association to procure Forrester and Ecclesby to continue their breaches of contract, and therefore he ought to be held liable to the plaintiff in this action. Upon the whole I do

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not feel myself able to accept this view. He was corresponding with the secretary of the association merely as the secretary of the local branch, and in paying strike pay to the men he was acting merely as a sort of conduit pipe in the performance of his duty, carrying out a formal duty of his employment. Agreeing with Vaughan Williams L.J. upon this point, I think that in Duckett's case the appeal should be dismissed. (1)

Appeal as against the defendant association allowed, but as against the defendant Duckett dismissed.

Solicitors for plaintiff: *Ward, Bowie & Co., for Walthall & Pritchard, Birmingham.*

Solicitors for defendants: *Pattinson & Brewer.*

E. L.

1908 *Nov.* 3.

MORRIS *v.* SHREWSBURY TOWN CLERK.

Parliament—Franchise—Borough Vote—Bribery by Agents at Municipal Election—Report by Municipal Election Court—Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 *Vict.* c. 51), *s.* 6, *sub-s.* 3 (*a*); *s.* 38, *sub-s.* 5—*Municipal Elections* (*Corrupt and Illegal Practices*) *Act*, 1884 (47 & 48 *Vict.* c. 70), *s.* 2; *s.* 3, *sub-s.* 2; *s.* 23.

If a candidate at a municipal election is reported by an election Court to have been guilty by his agents of a corrupt practice at the election, the effect of the report is that he is not capable of being elected to or holding any corporate office in the borough during a period of three years from the date of the report, and if he has been elected his election is void, but he is not deprived of his right to vote at a parliamentary election, inasmuch as the case is governed by s. 3, sub-s. 2, of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884.

Sect. 6, sub-s. 3 (*a*), and s. 38, sub-s. 5, of the Corrupt and Illegal Practices Prevention Act, 1883, extended to municipal elections by ss. 2 and 23 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, which disqualify the person so reported from voting at a

(1) It was agreed that, without prejudice to any right of appeal to the House of Lords, judgment should be entered against the defendant association for 50*l.* damages.

parliamentary election during a period of seven years from the date of the municipal election, apply only where the person reported has been personally guilty of a corrupt practice.

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CASE stated by the revising barrister for the borough of Shrewsbury.

At a Court held on September 11, 1908, before the revising barrister, the appellant Francis George Morris duly claimed that his name should be inserted as a parliamentary elector in the list of freemen of the borough of Shrewsbury and also as a burgess of the borough in division III. of the list for the Castle Fields Ward polling district (parish of St. Mary) in the borough, and also that his name should be expunged from the corrupt and illegal practices list formed under the Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), s. 39, and the Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (47 & 48 Vict. c. 70), s. 24, by the respondent as the registration officer and town clerk of the borough.

The revising barrister disallowed the appellant's claims on the following grounds:—The appellant was a candidate at an election of a town councillor for the Castle Fields Ward of the borough of Shrewsbury, holden on November 1, 1902. The appellant was returned at the election.

A petition was subsequently presented against the return and the election of the appellant, the petition alleging, inter alia, that general bribery had prevailed at the election, and that the appellant had been guilty of the corrupt practice of bribery by his agents. The petition was heard before a commissioner for the trial of election petitions, who by his report dated February 7, 1903, reported, inter alia, that the appellant was guilty of the corrupt practice of bribery by his agents, and that general bribery prevailed at the election, and the commissioner accordingly declared and certified that the election of the appellant was void.

It appeared to the revising barrister that the appellant, having thus been adjudged guilty of, and duly reported by the competent tribunal for, the corrupt practice of bribery by his agents, was by the combined effect of s. 6, sub-s. 3 (*a*), and s. 38, sub-s. 5, of the Corrupt and Illegal Practices Prevention Act, 1883, applied to municipal elections by ss. 2 and 23 of the Municipal Elections

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(Corrupt and Illegal Practices) Act, 1884, rendered incapable of being registered as an elector or of voting at any election in the United Kingdom during the period of seven years from November 1, 1902, the date of the election. The appellant contended before the revising barrister that his case was governed by s. 3, sub-s. 2, of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884 (1), but it appeared to him that that

(1) Corrupt and Illegal Practices Prevention Act, 1883, s. 6, sub-s. 3: "A person who is convicted on indictment of any corrupt practice shall (in addition to any punishment as above provided) be not capable during a period of seven years from the date of his conviction:

"(*a*) of being registered as an elector or voting at any election in the United Kingdom, whether it be a parliamentary election or an election for any public office within the meaning of this Act; . . . ."

Sect. 38, sub-s. 5: "Every person who after the commencement of this Act is reported by any election court or election commissioners to have been guilty of any corrupt or illegal practice at an election, shall, whether he obtained a certificate of indemnity or not, be subject to the same incapacity as he would be subject to if he had at the date of such election been convicted of the offence of which he is reported to have been guilty: Provided that a report of any election commissioners inquiring into an election for a county or borough shall not avoid the election of any candidate who has been declared by an election court on the trial of a petition respecting such election to have been duly elected at such election or render him incapable of sitting in the House of Commons for the said county or borough during the Parliament for which he was elected."

Municipal Elections (Corrupt and Illegal Practices) Act, 1884, s. 2, sub-s. 1: "The expression 'corrupt practice' in this Act means any of the following offences, namely, treating, undue influence, bribery, and personation as defined by the enactments set forth in Part One of the Third Schedule to this Act, and aiding, abetting, counselling, and procuring the commission of the offence of personation."

Sub-s. 2: "A person who commits any corrupt practice in reference to a municipal election shall be guilty of the like offence, and shall on conviction be liable to the like punishment, and subject to the like incapacities, as if the corrupt practice had been committed in reference to a parliamentary election."

Sect. 3, sub-s. 2: "Upon the trial of an election petition respecting a municipal election for a borough or ward of a borough in which a charge is made of any corrupt practice having been committed in reference to such election, the election court shall report in writing to the High Court whether any of the candidates at such election has been guilty by his agents of any corrupt practice in reference to such election, and if the report is that any candidate at such election has been guilty by his agents of a corrupt practice in reference to such election, that candidate shall

enactment had no bearing upon the points which he had to decide. If the Court should be of opinion that the decision was wrong, the register was to be amended by inserting the name of the appellant in the list of freemen of the borough of Shrewsbury and in the list of burgesses, and the name of the appellant was also to be expunged from the corrupt and illegal practices list.

G. H. B. Kenrick, for the appellant. The revising barrister was wrong. The effect of s. 6, sub-s. 3 (*a*), and s. 38, sub-s. 5, of the Corrupt and Illegal Practices Prevention Act, 1883, is to make a report of an election commissioner for a corrupt practice at a parliamentary election equivalent to a conviction on indictment and to deprive the person reported of his parliamentary vote. By ss. 2 and 23 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, the report of an election Court for a corrupt practice at a municipal election is to have the same effect. But those sections only apply where the person reported has

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not be capable of being elected to or holding any corporate office in the said borough, during a period of three years from the date of the report, and if he has been elected, his election shall be void."

Sect. 23: "So much of sections thirty-seven and thirty-eight of the Corrupt and Illegal Practices Prevention Act, 1883, as is set forth in Part Two of the Third Schedule to this Act, shall apply as part of this Act."

"THIRD SCHEDULE.

"PART II.

"*Enactments relating to Disqualification of Electors.*

"The Corrupt and Illegal Practices Prevention Act, 1883 (46 & 47 Vict. c. 51), ss. 37 and 38."

Sect. 37: "Every person who, in consequence of conviction or of the report of any election court or election commissioners under this Act, or under the Corrupt Practices (Municipal Elections) Act, 1872, or under Part IV. of the Municipal Corporations Act, 1882, or under any other Act for the time being in force relating to corrupt practices at an election for any public office, has become incapable of voting at any election, whether a parliamentary election or an election to any public office, is prohibited from voting at any such election, and his vote shall be void."

Sect. 38, sub-s. 5: "Every person who, after the commencement of this Act, is reported by any election court . . . . to have been guilty of any corrupt or illegal practice at an election, shall, whether he obtained a certificate of indemnity or not, be subject to the same incapacity as he would be subject to if he had at the date of such election been convicted of the offence of which he is reported to have been guilty. . . . ."

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himself been guilty of a corrupt practice. Sect. 3, sub-s. 2, of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, applies where, as in the present case, the person reported was only guilty of a corrupt practice by his agents, and the result is that the vote of the person reported remains unaffected, although he cannot hold any corporate office in the borough where the election took place for a period of three years from the date of the report, and if he was elected his election is void. The revising barrister has not distinguished between a corrupt practice by agents without the knowledge of the candidate, which will invalidate the election but will not deprive him of his vote, and a corrupt practice of which the candidate is personally guilty or which is committed with his knowledge and consent, and which involves the loss of his vote. [The *Norwich Case* (1), the Corrupt and Illegal Practices Act, 1883, ss. 4, 5, and 37, and the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, s. 3, sub-s. 1, were also referred to.]

The respondent did not appear.

LORD ALVERSTONE C.J. In this case, which has only been argued upon one side, I am of opinion that the contention on behalf of the appellant is right and that he ought to succeed. He was reported on February 7, 1903, for bribery by his agents at a municipal election. That he has in consequence come under certain disqualifications is not disputed, and on his behalf it has been pointed out that by s. 3, sub-s. 2, of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, he is disqualified for three years from holding corporate office or being elected in the borough. That sub-section does not deal in any way with the question of disqualification for voting. The revising barrister adjudged that the appellant was disqualified under s. 6, sub-s. 3 (*a*), and s. 38, sub-s. 5, of the Corrupt and Illegal Practices Prevention Act, 1883. Sect. 6, sub-s. 3 (*a*), of the Act of 1883 deals with a person convicted on indictment of any corrupt practice; he is to be incapable for seven years of being registered as an elector. It cannot be suggested that the appellant's case comes within that sub-section. In my judgment neither that

(1) (1869) 1 O'M. & H. 8, at p. 10.

sub-section nor s. 38, sub-s. 5, of the Act of 1883 imposes the disqualification to vote. I am further of opinion that s. 3, sub-s. 1, of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, indirectly assists the argument on behalf of the appellant, because it provides at its conclusion that in the case of a candidate who has been reported for personal bribery he shall suffer the same disqualification as if he had been convicted of a corrupt practice. In my judgment, therefore, the appeal must be allowed and the appellant's name placed on the register.

WALTON J. The revising barrister has held that the appellant was disqualified by the combined effect of s. 6, sub-s. 3 (*a*), and s. 38, sub-s. 5, of the Corrupt and Illegal Practices Prevention Act, 1883. I agree that neither of these sections applies to this case. We have not been referred to any provision that disqualifies the appellant from voting, and I am of opinion that the appeal must be allowed.

SUTTON J. I agree.

Appeal allowed.

Solicitors for appellant: *Flux, Leadbitter & Neighbour.*

J. E. A.

1908
Nov. 3.

MAJOR *v.* SHREWSBURY TOWN CLERK.

Parliament—Franchise — Borough Vote — Lodger Franchise — Declaration — Prima facie Evidence of Claim—Rebutting Evidence—Relationship between Lodger and Landlord—Parliamentary Registration Act, 1843 (6 *& 7 Vict. c.* 18), *ss.* 38, 39—*Parliamentary and Municipal Registration Act*, 1878 (41 *& 42 Vict. c.* 26), *s.* 23.

The prima facie evidence of the qualification of a person claiming to vote as a lodger, constituted under s. 23 of the Parliamentary and Municipal Registration Act, 1878, by the declaration annexed to the claimant's notice of claim, is not rebutted by the mere fact that the claimant's landlord is his father.

CASE stated by the revising barrister for the borough of Shrewsbury.

At a Court held on September 11, 1908, before the revising barrister, the appellant Leonard John Major claimed, as a person not already on the register, that his name should be inserted in the lodgers' list for the Quarry Ward polling district (parish of St. Chad) in the borough.

The following is a copy of the claim made by the appellant :—

Major, Leonard John.	Bedroom 2nd floor and use of sitting room first floor furnished.	4 to 6 Mardol Head.	15*s.* per week including board.	Mr. William Major of 4 to 6 Mardol Head.

No formal objection was made to the claim by any voter on the register for the borough nor by the overseer of the parish.

As it appeared on the face of the claim that the surname of the person stated to be the landlord of the appellant was the same as that of the appellant, the revising barrister inquired of the overseer of the parish whether the appellant was a son of the person whom he thus alleged to be his landlord. The overseer replied that the appellant was the son of the person named as the landlord.

The revising barrister held that the existence of this relationship between the appellant and the person whom he stated to be his landlord rebutted the prima facie evidence of a qualification

furnished by the declaration attached to the claim, following in this respect his usual practice in similar cases, as he had found by experience that in the vast majority of cases of lodgers' claims where the parties are son and father no contract of any kind exists between them, and that where any money payment is in fact made it is merely a contribution towards the housekeeping expenses of the family.

The revising barrister invited the party agent who was supporting the appellant's case to give him some evidence to establish the existence of a contract between the appellant and his father which would legally constitute the former a lodger in the house of the latter, but the agent declined to furnish any evidence. The revising barrister therefore disallowed the appellant's claim.

If the Court should be of opinion that the revising barrister's decision was wrong, the register was to be amended by inserting the name of the appellant in the lodgers' list.

Lewis Coward, *K.C.*, and *Daldy*, for the appellant. The Parliamentary and Municipal Registration Act, 1878, s. 23, provides that the declaration attached to the notice of claim shall be prima facie evidence of the claim to qualification, and in *Nuth* v. *Tamplin* (1) it was held that that section applies to lodger claims. In the present case no objection was made under s. 39 of the Parliamentary Registration Act, 1843, to the claim, and the mere fact that the appellant was the son of his landlord was not evidence which rebutted the prima facie evidence of qualification furnished by the declaration. The jurisdiction of the revising barrister to allow the claim is given by s. 38 of the Parliamentary Registration Act, 1843 (2), and the judgment of

(1) (1881) 8 Q. B. D. 247.

(2) Parliamentary Registration Act, 1843, s. 38: "The revising barrister shall insert in any list of voters for any city or borough the name of every person omitted who shall be proved to the satisfaction of such barrister to have given due notice of his claim to be inserted in such list, and to have been entitled on the last day of July then next preceding to have his name inserted therein in respect of the qualification described in such notice of claim."

Sect. 39: "It shall be lawful for any person whose name shall be on any list of voters of any county, city, or borough to oppose the claim of any person so omitted as aforesaid

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Baggallay L.J. in *Nuth* v. *Tamplin* (1) shews that, there being no objection to the claim and no rebutting evidence, it was the duty of the revising barrister to give effect to the declaration annexed to the notice of claim. The manner in which a lodger's description is filled up in the claim is shewn in Rogers on Elections, 16th ed., vol. 1, p. 698. [The Representation of the People Act, 1867 (30 & 31 Vict. c. 102), s. 30, sub-s. 2; the Parliamentary and Municipal Registration Act, 1878, ss. 24, 25, and 28, sub-ss. 2, 9, 12, and 13; the Registration Act, 1885 (48 & 49 Vict. c. 15), s. 4, sub-s. 5; *Flynn's Case* (2); and *In re Sale* (3) were also referred to.]

The respondent did not appear.

LORD ALVERSTONE C.J. I regret that this case has not been argued on behalf of the respondent, because it is impossible to carry all the registration cases in one's mind, and it may be that the point before us has been directly or indirectly discussed. On behalf of the appellant Mr. Coward has been good enough to give us the benefit of his assistance as far as he can by calling our attention to any cases that bear upon the matter. In my judgment there is no doubt that under s. 38 of the Parliamentary Registration Act, 1843, the revising barrister has a discretion. Doubts appear to have arisen as to the nature of the evidence which ought to be required with reference to claims by lodgers,

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to have his name inserted in any list of voters for the same county, city, or borough; and such person intending to oppose any such claim shall, in the Court to be holden as aforesaid for the revision of such list, and before the hearing of the said claim, give notice in writing to the revising barrister of his intention to oppose the said claim, and shall thereupon be admitted to oppose the same, by evidence or otherwise, without any previous or other notice, and shall have the same rights, powers, and liabilities as to costs, appeal, and other matters relating to the hearing and determination of the said claim, as any person who shall have duly objected to the name of any other person being retained on any list of voters, and who shall appear and prove the requisite notices as hereinafter mentioned."

Parliamentary and Municipal Registration Act, 1878, s. 23: "In the case of a person claiming to vote as a lodger, the declaration annexed to his notice of claim shall, for the purposes of revision, be prima facie evidence of his qualification."

(1) 8 Q. B. D. 247.

(2) [1900] W. N. 230.

(3) (1880) Colt. Reg. Cas. 152.

and accordingly it was enacted by s. 23 of the Parliamentary and Municipal Registration Act, 1878, that "In the case of a person claiming to vote as a lodger, the declaration annexed to his notice of claim shall, for the purposes of revision, be prima facie evidence of his qualification," and by s. 25 a penalty is imposed upon persons who make a false declaration. In the present case the declaration, according to the headings which unfortunately are not set out in the case stated by the revising barrister, gave the name of the claimant, the name of his landlord, and 15*s.* a week rent, including board, as the amount paid for a bedroom on the second floor and the use of a sitting-room on the first floor, furnished. If any question had been raised, or if the revising barrister had said he was not satisfied with reference to the question of value, his decision to strike off the name might have been correct, because it is not clear that the declaration would have been prima facie evidence of the claim. The case states that the rent is 15*s.* per week, including board, and some question might have arisen as to the revising barrister being satisfied that the value of the rooms amounted to that which is necessary for a lodger's qualification; but the only point suggested by the revising barrister as that as to which he was not satisfied arose from the fact that the names were the same, and that he ascertained from the overseer that the appellant was the son of the person named as the landlord. The revising barrister did not direct further inquiry to be made into the case or require further evidence. He states in the case that he has found by experience that in the vast majority of cases of lodger claims where the parties are son and father no contract of any kind exists between them, and that where any money payment is in fact made it is merely a contribution towards the housekeeping expenses of the family; that he invited the party agent who was supporting the appellant's case to give him some evidence to establish the existence of a contract between the appellant and his father which would legally constitute the former a lodger in the house of the latter, but that the agent declined to furnish any evidence. It seems to me that it cannot properly be said that there was any evidence which would rebut (or which the revising barrister could take into consideration by way of rebuttal) the prima facie effect

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of the declaration made by the claimant. In my judgment, therefore, the revising barrister ought to have inserted this name in the list, and the appeal should be allowed.

WALTON J. I agree.

SUTTON J. I am of the same opinion.

Appeal allowed.

Solicitors for appellant : *Lewis & Lewis.*

J. E. A.

C. A.

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Dec. 1, 2, 11.

[IN THE COURT OF APPEAL.]

ANSLOW *v.* CANNOCK CHASE COLLIERY COMPANY, LIMITED.

Employer and Workman—Compensation—Basis of Calculation—"Average Weekly Earnings"—Workmen's Compensation Act, 1906 (6 *Edw.* 7, c. 58), *Sched. I., ss.* 1, 2.

A miner in the employment of a colliery company was injured by an accident and thereby totally incapacitated. He had been employed by the company in the same grade throughout the whole of the twelve months preceding the accident. During that period he earned 68*l.*, but only actually worked for thirty-three weeks. Of the remaining nineteen weeks of the year there were fourteen weeks of stoppage, two weeks of public holidays, two weeks when he was ill, and one week when he took a holiday. In proceedings by the workman to recover compensation under the Workmen's Compensation Act, 1906, it was found that the fourteen weeks of stoppage and the two weeks of public holidays were normal and recognized incidents of the employment, and that out of thirty-six working weeks the workman had worked thirty-three :—

Held, that the proper method of computing his "average weekly earnings" was to divide the 68*l.* by 33, and then make a fractional deduction of $\frac{1}{52}$, as suggested by Fletcher Moulton L.J. in *Bailey* v. *Kenworthy*, [1908] 1 K. B. 441, at p. 466.

The statement in the head-note to *Bailey* v. *Kenworthy* that "days in which no work is done and no wages are earned are to be disregarded" is too wide.

APPEAL from an award of the county court judge of Lichfield sitting as arbitrator upon a claim under the Workmen's Compensation Act, 1906.

The applicant was a miner in the employment of the respondents, the Cannock Chase Colliery Company, Limited, and on January 11, 1908, met with an accident which totally incapacitated him from following his employment, thereby admittedly entitling him to be paid a weekly sum equal to 50 per cent. of his average weekly earnings, and the question before the county court judge was the quantum of the compensation.

The facts on the hearing of the arbitration in the county court were agreed as follows: The applicant was in the employment of the respondents in the same grade throughout the whole of the twelve months preceding the accident. His actual earnings during that period were 68*l.* 4*s.* 9*d.*, with the addition of an allowance of coal the value of which was agreed at 2*s.* per week. During the above period of twelve months he actually worked for thirty-three weeks, no work being done during the following periods for the reasons stated, namely, (1.) fourteen weeks on account of trade not being sufficiently brisk to admit of the pit being worked the full five and three-quarter days per week; (2.) two weeks when no work was done owing to public holidays, such as Bank holidays and wakes; (3.) two weeks when the applicant was absent from sickness; and (4.) one week when the applicant was absent on his own account. It was contended before the county court judge on behalf of the applicant that the right method of obtaining the average weekly earnings was to divide 68*l.* 4*s.* 9*d.* by 33, the number of weeks for which the applicant worked, and on the other hand, on behalf of the respondents, that the right divisor was 52, the number of weeks in the year.

The county court judge held that the fourteen weeks' stoppage of work on account of trade and the two weeks of public holidays were normal and recognized incidents of the applicant's employment. He held, therefore, that there were thirty-six working weeks in the year, out of which the applicant had worked thirty-three, and in calculating the amount of the applicant's average weekly earnings he divided the actual earnings by 33, and from the result deducted $\frac{16}{52}$, being the difference between the full number of weeks in the

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year and the number of working weeks. Of the sum so arrived at he awarded the applicant a weekly payment of one-half, to which by consent was to be added 1*s.* as compensation for the loss of the coal allowance.

From this award the applicant appealed.

Hugo Young, K.C., and *Milward*, for the appellant. According to Sched. I. (2.) (*a*) the weekly earnings are to be computed so as to give the "rate per week" at which the workman was being remunerated; the test therefore is, not what the man has earned in any twelve months, but what was he able to earn per week. Was he a 2*l.* a week man or a 30*s.* a week man? The method adopted by the county court judge of dividing the total earnings by the number of weeks worked was correct, but when he went on to make a further fractional deduction on the lines suggested by Fletcher Moulton L.J. in *Bailey* v. *Kenworthy* (1), then he was wrong. None of the other judgments in that case make any reference to any further fractional deduction. The county court judge has misdirected himself on this point: this further fractional deduction is contrary to the words of Sched. I. (2.) (*a*).

C. A. Russell, K.C., and *E. W. Cave*, for the respondents, were not called upon.

Cur. adv. vult.

Dec. 11. COZENS-HARDY M.R. This appeal raises the question how the average weekly earnings of a collier during the twelve months before the accident, liability for which is admitted, ought to be calculated. He was in the employment of the respondents during the whole period of twelve months, and was entitled to an allowance for coal whether actually working or not. I accept, as I am bound to do, the following findings of the learned county court judge. First, the total amount of wages actually received during the twelve months was 68*l.* odd; second, there were fourteen weeks of stoppage, when he could not get work, two weeks for Bank holidays and wakes, when he did not work, two weeks when he was away from illness, and one week when he took a holiday, leaving thirty-three weeks

(1) [1908] 1 K. B. 441, at p. 466.

during which he actually worked; third, the fourteen weeks of stoppage and the two weeks of Bank holidays and wakes were normal and recognized incidents of the applicant's work, and not due to abnormal or fortuitous circumstances, such as a fire in the mine. I have used the phrase "weeks," as the county court judge does, as meaning an aggregate of days amounting to weeks, reckoned at the agreed rate of five and three-quarter days per week. Now the dominant principle which ought to be applied is stated in the First Schedule (2.) (*a*): "Average weekly earnings shall be computed in such manner as is best calculated to give the rate per week at which the workman was being remunerated." In my opinion the true test is this. What were his earnings in a normal week, regard being had to the known and recognized incidents of the employment? If work is discontinuous, that is an element which cannot be overlooked. For example, if the normal days of work are four days a week, for which 20*s.* are paid, it is a fallacy to say that the average weekly earnings are 30*s.* That is not the rate per week at which he was being remunerated. To say that he got 5*s.* a day for every day during which he worked does not involve the proposition that he got 5*s.* for every day in the week. Such a proposition has no warrant in fact and I decline to accept it. I think that days in which no work was done must be disregarded for the purposes of the division of the total wages earned. That reduces the fifty-two weeks to thirty-three. But the sum arrived at by the fraction $\frac{68}{33}$ does not represent his earnings in a normal week, or his average earnings during the whole twelve months. It represents only the average during a portion of the year, namely, during the thirty-six weeks when the colliery was working. In other words, the true result is represented by the fraction $\frac{36}{52}$ of $\frac{68}{33}$. This is the method adopted by the learned county court judge. It must not be forgotten that compensation as distinguished from damages is what the Act gives, and that compensation must be measured according to the provisions of the Act.

I have not thus far referred to the decision of this Court in *Bailey* v. *Kenworthy* (1), but I think the present appeal is really

(1) [1908] 1 K. B. 441.

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concluded by that decision. The precise point is dealt with by Fletcher Moulton L.J. (1), and although in my judgment I referred only to the true divisor (2), that was because the figures were agreed between the parties, and not because of any difference of opinion.

Since this judgment was written, my attention has been called to a very recent decision in the Court of Session of *Carter* v. *John Lang & Sons* (3), in which the view which I have expressed was adopted. The judgment of the Lord President in terms approves of the method of Fletcher Moulton L.J. in *Bailey* v. *Kenworthy* (1) above referred to. I desire also to add that I agree with the Lord President's comment on that part of the head-note to *Bailey* v. *Kenworthy* (4) which states that "days in which no work is done and no wages are earned are to be disregarded." That is expressed in too general terms. The appeal must be dismissed with costs.

FLETCHER MOULTON L.J. I agree.

FARWELL L.J. I agree.

Appeal dismissed.

Solicitors: *R. A. Willock & Taylor; Beale & Co., London and Birmingham.*

(1) [1908] 1 K. B. 465, at p. 466.
(2) Ibid. at p. 454.
(3) (1908) 10 F. 1198, at p. 1203.
(4) [1908] 1 K. B. 441.

G. A. S.

MORGAN *v.* RUSSELL & SONS.

1908
Oct. 23, 28;
Nov. 26.

Vendor and Purchaser—Sale of Goods—Interest in Land—Slag to be severed and removed by Purchaser — Breach of Contract — Defect of Title — Damages—Sale of Goods Act, 1893 (56 & 57 *Vict. c.* 71), *ss.* 51, 62.

In a counter-claim by purchasers against a vendor it appeared that the vendor was the lessee of certain land part of which was composed of slag and cinders. On adjoining lands occupied by other persons were two disused cinder-tips. The vendor had obtained from these persons licences to remove from the tips slag and cinders adhering to and forming part of their lands. He then agreed with the purchasers to sell to them all the slag on the demised premises and from the tips on the lands adjoining, or so much thereof as the purchasers should desire to remove, and for that purpose to give the purchasers access to the demised premises and the cinder-tips on the adjoining lands. After certain slag had been removed by the purchasers and sold at a profit the lessor and licensors of the vendor intervened and prevented the further removal of slag by the purchasers.

The purchasers sued for damages for the vendor's default in delivering or giving access to the slag sold :—

Held, that the agreement was not a contract for the sale of goods within the meaning of s. 62 of the Sale of Goods Act, 1893, so as to entitle the purchasers to recover as damages the difference between the contract and the market price of the slag under s. 51 of that Act; but

Held, that the agreement was a contract to grant an interest in land, and that, as the vendor's failure to perform his contract was due solely to a defect in his title, the purchasers could not recover any damages for the loss of their bargain.

The principle of *Flureau* v. *Thornhill*, (1777) 2 W. Bl. 1078, and *Bain* v. *Fothergill*, (1874) L. R. 7 H. L. 158, applied.

Appeal from the judgment of the judge of the county court of Glamorganshire holden at Swansea on a counter-claim by the defendants against the plaintiff.

The writ in the action was issued by the plaintiff to recover from the defendants the price of certain puddle slag, iron slag, and cinders sold by him to them under the agreement and in the circumstances hereinafter set out. The plaintiff recovered judgment on this claim, and from that judgment there was no appeal.

The defendants counter-claimed for the plaintiff's alleged breach of contract in failing after a certain date to supply them with any further slag and cinders under the agreement. On this counter-claim the county court judge gave judgment for the

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plaintiff in the action. From that judgment the defendants brought the present appeal.

The facts were as follows:—On October 6, 1904, the plaintiff became the lessee to one Colonel Benson of certain land and dismantled buildings thereon known as the Penclawdd Works. The demised premises had formerly adjoined certain copper and lead works, and had subsequently formed the site of ironworks, and a quantity of puddle slag, iron slag, and cinders from these works had been deposited upon and formed part and parcel of the demised premises and certain lands adjoining them. On the north-west corner of the demised premises, and on adjoining land in the occupation of the Duke of Beaufort between the demised premises and the foreshore, was an old cinder-tip composed largely of puddle slag. On the east of the demised premises, and on adjoining land in the occupation of one W. J. Rees and the Misses Rowe, was a similar tip. Each of these tips was about fifty years old and the slag composing them had become part of the land.

The plaintiff had obtained a licence from the Duke of Beaufort to take slag from the tip on his land at the price of 2*d.* per ton, and a similar licence from W. J. Rees to take slag from the tip on his land at the same price. He had also obtained a way-leave over the land belonging to the Misses Rowe and a licence to take slag and cinders from their land.

On January 23, 1907, the following agreement was entered into between the plaintiff and the defendants:—"An agreement made this 23rd day of January, 1907, between Thomas Morgan of Llanelly in the county of Carmarthen of the one part and J. H. Russell and Sons of Penclawdd in the county of Glamorgan of the other part Whereas by memorandum of agreement dated October 1, 1906, the said Thomas Morgan agreed to sell to J. H. Russell and Sons certain cinders at Penclawdd Works And whereas certain disputes have recently arisen between the parties hereto with reference to the construction and terms of the said agreement by reason whereof on January 2, 1907, the said J. H. Russell and Sons issued a writ in the High Court of Justice to enforce their rights thereunder And whereas the said parties are desirous for an amicable settlement of the matters

now in dispute between them and for a termination of the said action it is hereby agreed as follows :—

"1. The said Thomas Morgan agrees to sell to Messrs. J. H. Russell and Sons all the cinders and puddle slag or iron slag (but not iron) in or about the Penclawdd Works both on the tip on and adjoining the foreshore and on the tip to the east of the works and the puddle slag lying in or about the yard of the said works or such part of such cinders and puddle slag as the said J. H. Russell and Sons may desire to remove at the price of two shillings and three pence per ton, payment therefor to be made on Monday in each week for such slag and cinders as have been removed during the previous week. Should any one of such weekly payments be in arrear for the space of seven days the said Thomas Morgan shall be at liberty to prevent the said J. H. Russell and Sons removing any more cinder or puddle slag until such time as the said arrears shall have been paid but no longer or otherwise.

"2. Subject to the last portion of clause 1 hereof the said Thomas Morgan shall give the said J. H. Russell and Sons at all times free access to the said tips and yard for the purpose of removing the said cinders and puddle slag.

"3. The said J. H. Russell and Sons shall be at liberty to terminate this agreement by giving to the said Thomas Morgan six calendar months' notice in writing of their intention so to do such notice to expire on any day and shall not be under any liability to remove any more slag or cinder or refuse from the said tips either during the time such notice is running or subsequently. In case the said Thomas Morgan shall let or sell the said works or shall not be able to reserve the said cinder and puddle slag in the yard of the said works he shall be at liberty to terminate this agreement by giving to the said J. H. Russell and Sons six calendar months' notice in writing of his intention so to do and such notice may be given upon any day but such notice shall not apply to the tip on or adjoining the foreshore or the tip to the east of the works as to which the said Thomas Morgan shall have no power to determine this agreement.

"4. The hereinbefore mentioned agreement of October 1, 1906, is hereby cancelled and the terms of this agreement shall be in substitution therefor.

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"5. The said J. H. Russell and Sons shall not take any further step in the said action so long as the said Thomas Morgan shall continue to observe the conditions and stipulations hereof."

This agreement was acted upon by the parties, and a considerable amount of cinders and slag had been severed and removed by the defendants and sold by them at a profit, when, in the month of April, 1907, the cinders and slag on the foreshore tip were claimed by Colonel Benson as his property, and in May and July, 1907, the cinders and slag on the east tip were claimed as to one part by the Misses Rowe and as to the other part by W. J. Rees as their property respectively. The plaintiff was at all times willing, so far as in him lay, to give the defendants access to and allow them to remove the slag and cinders according to the agreement; but the claimants debarred the defendants from further access to the demised premises and to the tips on the land adjoining them, and the defendants were thereby prevented from removing any more slag and cinders therefrom.

The defendants claimed damages for the alleged failure of the plaintiff to give delivery of any further slag or cinders and to give them free access to the demised premises and the tips for the purpose of removing slag and cinders according to the agreement. The defendants further alleged that they had an available market at 8*s.* 6*d.* per ton for all undelivered cinders and slag, which, on their estimate, amounted to 9656 tons, on which they claimed loss of profit at 4*s.* 3*d.* per ton.

The county court judge gave judgment for the plaintiff on the ground that the agreement was a contract for the sale of land, and that, the failure of the plaintiff to deliver further slag and cinders being due solely to a defect in his title, the cases of *Flureau* v. *Thornhill* (1) and *Bain* v. *Fothergill* (2) applied and precluded the defendants from recovering damages for loss of the bargain.

The defendants appealed.

Simon, K.C., and *D. Lleufer Thomas*, for the appellants. The agreement of January 23, 1907, is a contract for the sale of goods

(1) 2 W. Bl. 1078. (2) L. R. 7 H. L. 158.

within the Sale of Goods Act, 1893. (1) By s. 62 of that Act "goods" include things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale. The slag and cinders in question answer that description, and it matters not that they were to be taken by the purchasers, because s. 62 of the Act draws no distinction between the cases where the things forming part of the land are to be severed by the vendor and where they are to be severed by the purchaser. The law was the same before the Sale of Goods Act, 1893: see *Marshall* v. *Green*. (2) The case of *Lavery* v. *Pursell* (3), which at first sight appears to be against this view, is really not ad rem. It was there held that a contract for the sale of the building materials of a house, with a proviso that all the materials were to be taken down and cleared off the ground by the purchaser within a limited time, was a contract or sale of an interest in land within the meaning of s. 4 of the Statute of Frauds, so that no action could be brought upon it in the absence of a memorandum or note in writing signed by the party to be charged or his agent. But that does not affect the measure of damages for a breach of the contract; it is quite consistent with that case that if the vendor had failed to give a title to the building materials the measure of damages would have been the difference between the contract price of the materials and the price which the purchaser

(1) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 51: "(1.) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may maintain an action against the seller for damages for non-delivery.

"(2.) The measure of damages is the estimated loss directly and naturally resulting, in the ordinary course of events, from the seller's breach of contract.

"(3.) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered, or, if no time was fixed, then at the time of the refusal to deliver."

Sect. 62: "(1.) In this Act, unless the context or subject-matter otherwise requires, ...

"'Goods' include all chattels personal other than things in action and money, and in Scotland all corporeal moveables except money. The term includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

(2) (1875) 1 C. P. D. 35.

(3) (1888) 39 Ch. D. 508.

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could have realized on a resale. When the measure of damages is the matter in dispute, the question whether the contract is for a sale of land or a sale of goods depends upon whether the purchaser is to take the subject-matter of the sale as land or as chattels. Therefore a contract for the sale of timber to be severed and removed by the purchaser is a sale of goods: *Smith* v. *Surman* (1); *Marshall* v. *Green*. (2) So is a contract for the sale of cinders to be removed from a cinder-tip by the purchaser: *Smart* v. *Jones* (3), a case which is indistinguishable on the facts from the present. Growing crops to be severed by the purchaser follow the same rule and are analogous to the slag and cinders in the present case. In all these cases the licence to enter upon the land of the vendor for the purpose of severing and removing the subject-matter of the sale is treated as merely incidental to the main contract which is for the sale of goods. These contracts are not, as contracts for the sale of land are, subject to a condition precedent to the obligation of either party that the vendor should have a good title to the subject-matter of the sale; for a vendor may and frequently does sell goods to which he has no title: *Smart* v. *Jones*. (3) The title of the vendor is at the highest a condition subsequent, that is to say, a matter for damages if he has no title.

But even if this were an agreement for a sale of land it is not a contract to which the principle of *Flureau* v. *Thornhill* (4) and *Bain* v. *Fothergill* (5) is applicable. That principle applies to contracts for the sale of land to be taken as land by the purchaser and conveyed by formal deed of conveyance by the vendor, provided the vendor can shew a good title. In such a case, if the vendor has no title, he is no more liable to the purchaser for the loss of the bargain than the purchaser is liable to the vendor. It is the intention of the parties that unless the vendor has a title there shall be no conveyance. Hence the elaborate proceedings between the parties, the delivery of an abstract of title by the vendor to the purchaser, the requisitions on title made by the latter, the answers of the former to those requisitions,

(1) (1829) 9 B. & C. 561.
(2) 1 C. P. D. 35.
(3) (1864) 15 C. B. (N.S.) 717.
(4) 2 W. Bl. 1078.
(5) L. R. 7 H. L. 158.

with possibly an application to the Chancery Division under the Vendor and Purchaser Act, 1874; all which proceedings are aimed at solving the question whether the vendor has a good title, it being the common intention of both parties that there shall be no conveyance unless the vendor can shew a good title. These considerations have no place in a contract where the intention is that the vendor shall enable the purchaser to sever and remove as goods either growing crops or timber, or even portion of the land such as slag or cinders. In the present case, to quote the words of Willes J. in *Smart* v. *Jones* (1), "The seller agrees that the buyer shall have the article contracted for; and the latter, through the default of the former, has been unable to obtain it,—the seller having no title: and so the buyer has lost the profit he would have made."

But whatever the law may have been before the Sale of Goods Act, 1893, it is plain that since that Act this agreement was a sale of goods within the meaning of the Act. The definition of "goods" in s. 62 covers the subject-matter of this contract, and none the less because it was to be severed from the land by the purchasers: see Benjamin on Sale, 5th ed. p. 190. That being so, it follows that by s. 12 of the Act there was an implied covenant for title, and *Flureau* v. *Thornhill* (2) and *Bain* v. *Fothergill* (3) have no application; and by s. 51 the measure of damages is the difference between the contract price and the market price, there being in the present case an available market for the slag and cinders when removed.

Atkin, K.C., and *L. M. Richards*, for the respondent. If the respondent had agreed to grant to the appellants a mining lease, it can hardly be doubted that the principle of *Flureau* v. *Thornhill* (2) and *Bain* v. *Fothergill* (3) would have applied, and the appellants, the grantees, could not have recovered damages for loss of the bargain when it was found that their grantor or vendor had no title. The agreement in the present case is exactly analogous to an agreement for a mining lease, where the lessor agrees to grant to the lessee a right to enter upon the land and dig and carry away gravel or brick earth, coal, or any other

(1) 15 C. B. (N.S.) at p. 725. (2) 2 W. Bl. 1078.
(3) L. R. 7 H. L. 158.

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mineral forming part of the land: *Lavery* v. *Pursell.* (1) The case of *Marshall* v. *Green* (2) is distinguishable, for there the contract was for the sale of timber, and not, as in the present case, for part of the land itself. The words in s. 62 of the Sale of Goods Act, 1893, "things attached to and forming part of the land," mean things of the same nature as "emblements and industrial growing crops," and have no application to a contract for sale of the land itself or part thereof. In *Smart* v. *Jones* (3) no point was made as to the application of the doctrine of *Flureau* v. *Thornhill* (4) and *Bain* v. *Fothergill.* (5)

Simon, K.C., in reply.

Cur. adv. vult.

Nov. 26. LORD ALVERSTONE C.J. read the following judgment:— This is an appeal from his Honour Judge Bryn Roberts giving judgment for the respondent, the plaintiff in the action, on a counter-claim set up by the appellants Messrs. Russell & Sons in respect of an alleged breach of contract of January 23, 1907, made between the respondent Morgan and the appellants Russell & Sons, whereby the respondent agreed to sell to the appellants certain cinders and puddle slag. [His Lordship read the agreement of January 23, 1907, set out above, and continued:—] This agreement was acted upon by the parties, and after the appellants had taken a considerable amount of cinders and slag from the tip on the foreshore and the tip to the east of the works the slag in those two tips was claimed by third persons, and the appellants were no longer able to obtain the slag under and by virtue of the powers conferred on them under the agreement, and brought this counter-claim against the respondent to recover damages for breach of contract.

The learned judge has found, and we have no power to interfere with that finding, that the cinders and slag had become part of the ground or soil itself, and were not definite or detached heaps resting, so to speak, upon the ground. The learned judge considered that under these circumstances the default, if any, in

(1) 39 Ch. D. 508.
(2) 1 C. P. D. 35.
(3) 15 C. B. (N.S.) 717.
(4) 2 W. Bl. 1078.
(5) L. R. 7 H. L. 158.

the carrying out of the agreement arose from a defect in the respondent's title, and that therefore, upon the principle of *Bain* v. *Fothergill* (1), the appellants were not entitled to recover damages for the loss of their bargain. The case for the appellants was rested upon two grounds: it was first said that this was a contract for the sale of goods within s. 62 of the Sale of Goods Act, 1893, and therefore the ordinary rule of damages applies; and secondly that, even assuming that the cinders and slag were not goods, the principle of *Bain* v. *Fothergill* (1) would not apply, and the appellants were entitled to general damages. I am clearly of opinion that this was not a contract for the sale of goods. The respondent Morgan did not contract to sell any definite quantity of mineral, nor was it a contract for the sale of a heap of earth which could be said to be a separate thing. In my view the contract was a contract to give free access to certain tips for the purpose of removing cinders and slag which formed part of the soil at the price of 2*s*. 3*d*. per ton, to include the value of the slag so taken, for so long as the appellants chose to exercise their option to take. The contract appears to me to be exactly analogous to a contract which gives a man a right to enter upon land with liberty to dig from the earth in situ so much gravel or brick earth or coal on payment of a price per ton. The first ground therefore in my opinion is not one upon which the appeal can succeed.

The second argument to my mind presents more difficulty; that is to say, assuming the contract to be such as I have said, does the principle of *Bain* v. *Fothergill* (1) apply? In order to decide this it seems to me that one must ascertain accurately what are the facts. The appellants by their counter-claim alleged that the owners of the slag other than the respondent claimed the slag in question; and it was stated, and is, I think, involved in the judgment, that but for this claim the respondent would have been willing and would have continued to allow the appellants to enter upon the property and take away the slag. The difficulty arose entirely from the respondent having given permission to take cinders and slag which were not his own. If the claim against the respondent had been based upon some contract or representation whereby the respondent had warranted

(1) L. R. 7 H. L. 158.

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that the cinders or slag were his or that he had undertaken to procure them, then, in my judgment, on his failing to do so, the appellants might have been entitled to recover damages, and the principle of *Bain* v. *Fothergill* (1) could not properly be said to apply. But where, as in this case, the respondent was willing that the appellants should exercise their rights under the agreement, it seems to me that the difficulty which prevented the appellants from continuing to exercise their rights was a defect in the respondent's title. It may be that in some action otherwise framed the appellants would have been entitled to substantial damages, but not under the contract appearing on the facts stated in this counter-claim and found by the learned judge. I think it only right to add that, as far as I understand the proceedings, there was no evidence that the respondent obstructed or denied the right of access to the tips. On the contrary, we were informed that the barriers were put up by the persons claiming to be the owners of the slag, and not by the respondent, so that no breach arose in consequence of the failure by the respondent to give the appellants access during any time prior to the refusal of the owners of the cinders and slag to allow it to be removed. For these reasons in my opinion the judgment should be affirmed and the appeal dismissed with costs.

WALTON J. I agree with the judgment of my Lord, and only desire to add a few words. I wish to guard myself against any expression of opinion that a contract for the sale of minerals ungotten at the date of the contract may not be a sale of goods within the meaning of s. 62 of the Sale of Goods Act, 1893. We have to decide, not whether any such contract may be, but whether this particular contract is, a contract for the sale of goods. I have come to the conclusion that it is not. Two analogies were suggested, one on each side. First it was said that the case was not to be distinguished in principle from a contract for the sale of growing crops to be removed by the purchaser, a case which is expressly dealt with by s. 62 of the Act. But the analogy, though specious, is not true. On the other side this contract is said to be analogous to an agreement

(1) L. R. 7 H. L. 158.

for a mining lease. That is also a different case; but if one had to choose between the two suggested analogies, I should say that the present contract was more like an agreement for a mining lease than a contract for the sale of growing crops.

The second question is whether this case falls within the exception established by *Flureau* v. *Thornhill* (1) and *Bain* v. *Fothergill* (2) to the general rule as to damages for breach of contract. I think it does. If the contract had contained an express term that the respondent should execute a grant to the appellants of the rights and interests which he has agreed that they shall enjoy, and if it had turned out that a valid grant could not be made and that the contract could not be completed because of a defect in the respondent's title, it seems to me that the case would have fallen within the principle of *Flureau* v. *Thornhill* (1) and *Bain* v. *Fothergill.* (2) The ordinary instance of that principle is a contract for the sale of land where the parties contemplate the execution of a conveyance, which is discovered to be impossible through a defect in the grantor's title. There is no difference for this purpose between a conveyance of the land itself and a grant of a right or interest in the land; if there had been an agreement to execute a grant of the right to enter upon the land and take the slag, the case would have fallen within *Rowe* v. *School Board for London.* (3) It makes no real difference if the contract be that the purchasers shall exercise and enjoy that right or interest. It was not in the present case the intention of the parties that any formal grant under seal should be executed, but it was their intention that the defendants should really have and enjoy all the rights of a legal grantee, which amounts to the same thing.

I agree, therefore, that the appeal should be dismissed.

Appeal dismissed.

Solicitor for appellants: *J. T. Lewis, for Andrew & Thompson, Swansea.*

Solicitors for respondent: *T. D. Jones & Co., for Edward Harris, Swansea.*

(1) 2 W. Bl. 1078. (2) L. R. 7 H. L. 158.
(3) (1887) 36 Ch. D. 619.

W. H. G.

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Oct. 19;
Dec. 19.

HERTFORDSHIRE COUNTY COUNCIL *v.* GREAT EASTERN RAILWAY COMPANY.

Railway Company—Level Crossing—Road raised on Inclined Planes—Repair of Roadway.

A railway company, being authorized to carry their railway across a high road on the level, constructed the railway at a slightly higher level than the road, and, in order to bring the road up to the level of the railway, raised it by means of inclined planes on either side of the railway under powers conferred by their special Act. The Act was silent as to any obligation of the company to repair the roadway upon the inclined planes:—

Held, that there was imposed upon the company by the common law, as a condition of the statutory authority to interfere with the high road, an obligation to keep in repair the roadway upon the whole of the inclined planes, including those portions which lay outside the fences of the railway.

West Lancashire Rural Council v. *Lancashire and Yorkshire Railway*, [1903] 2 K. B. 394, distinguished.

SPECIAL CASE stated by consent of the parties.

The plaintiffs' claim in the action was for a declaration that the defendants were bound to maintain and keep in repair the highways over certain level crossings of the defendants' railway in the county of Hertford near Sawbridgeworth Station, near Spellbrook Hamlet, and near South Mill, Bishop's Stortford, respectively, including all the approaches on either side of such crossings, and for a mandatory order enjoining them from time to time to make such repairs as might be necessary.

The plaintiffs are the highway authority responsible for the repair of the main roads in the county of Hertford. Amongst other main roads for which they are responsible are the roads which are crossed by the defendants' railway at the level crossings above mentioned.

The Northern and Eastern Railway Company were authorized to construct the said railway by a special Act of Parliament passed in the year 1836 (6 & 7 Will. 4, c. ciii.) (1), and

(1) By 6 & 7 Will. 4, c. ciii., s. 31, it is provided as follows: "For the purposes and subject to the provisions and restrictions of this Act it shall be lawful for the said company . . . . to make or construct upon

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constructed it in accordance with the provisions of that Act so as to cross the said highways at the places specified by means of level crossings.

In the course of constructing the parts of the railway at the said level crossings the company made their railway (including the permanent way and ballasting) at a higher level than that of the original highways respectively crossed by the railway, and in order to bring the highways respectively up to the level of the railway, and to render the highways continuous and without interruption from a difference in level between the railway and the original levels of the adjoining lengths of highways, and to restore their use, raised the adjoining portions of highways respectively on either side of the railway. These portions of the highways, herein referred to as the "approaches," were respectively raised for the lengths and to the heights as follows:—

Sawbridgeworth level crossing.—The approach on one side of the railway was 174 feet long, rising in that distance three feet

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across under or over the said railway or other works or any lands streets hills valleys roads railroads or tramroads rivers canals brooks streams or other waters such inclined planes tunnels embankments aqueducts bridges roads ways passages conduits drains piers arches cuttings and fences as the company shall think proper; . . . . and also to divert or alter the course of any roads or ways or to raise or sink any roads or ways in order the more conveniently to carry the same over or under or by the side of the said railway; . . . . and also from time to time to alter repair or discontinue the before-mentioned works or any of them and to substitute others in their stead and generally to do and execute all other matters and things necessary or convenient for constructing maintaining altering or repairing and using the said railway and other works by this Act authorised; they the said company . . . . doing as little damage as may be in the execution of the several powers to them hereby granted, and the said company making full satisfaction in manner hereinafter mentioned."

Sect. 102: "The said railway shall not be made across any street or highway or public bridleway or footpath on the level without the previous consent in writing of some two justices of the peace for the county acting for the division within which the street highway bridleway or footpath so to be crossed shall be situate, and where the said railway shall cross any public bridleway or footpath in any other manner than on the level the said company shall make and maintain convenient ascents and descents as the case may be to such bridleway or footpath."

Sect. 104 is in almost identical terms with s. 102 and was apparently left in the Act by mistake.

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nine inches, while that on the other side was 152 feet long, rising two feet six inches.

Spellbrook level crossing.—The approach on one side was 60 feet long, rising four feet three inches; that on the other side was 80 feet long, rising four feet five inches.

South Mill level crossing.—The approach was on one side 365 feet, rising nine feet nine inches, and that on the other side 355 feet, rising ten feet ten inches.

The company erected gates by the side of the railway at each side of the said level crossings respectively.

The railway has become vested by purchase in the defendants, who are bound by all the obligations and subject to all the liabilities of the Northern and Eastern Railway Company.

The defendants and their predecessors have always maintained and kept in repair those portions of the respective highways lying inside of and between the gates above mentioned, and the defendants admit their liability to maintain and repair these parts.

The said approaches and the highways thereon lying outside the gates have been kept in repair and maintained by the defendants and their predecessors until shortly before this action, when the defendants ceased so to do and disputed their liability to do it.

The question for the opinion of the Court was whether the defendants were bound to repair and keep in repair the said approaches and the highways thereon.

Danckwerts, K.C., and *R. D. Muir*, for the plaintiffs. The railway company are bound to repair the approaches to the level crossings. This liability does not arise from the special Act under which the railway was made, for though that Act by s. 31 empowers the company "from time to time to . . . . repair . . . . the before-mentioned works," including "inclined planes," it contains no words of obligation. The liability exists at common law. It is a well-settled doctrine of the common law that where a person is authorized by statute to interfere for his own purposes with a high road by cutting a canal across it, or carrying a railroad across it, the authority is presumed to be

subject to the condition that he leaves the road as good and convenient for the purposes of public passage as it was before the interference. Thus in *Rex* v. *Inhabitants of the Parts of Lindsey* (1), where a canal company were authorized to make navigable cuts, and in pursuance of that authority for their own purposes made a cut across a highway and thereby rendered a bridge necessary for the passage of the public, which bridge they accordingly built, it was held that they were bound to repair it, and that the burden of repair could not be thrown on the inhabitants of the Parts of Lindsey, a division of the county of Lincoln, as the body primarily liable for the repair of bridges in the county. And the same thing was held in *Rex* v. *Kerrison* (2) on precisely similar facts. Lord Ellenborough there said: "Can we put any other construction upon the Act but this, that the Legislature intended that so far as regarded the making the river navigable, and the cutting new channels for that purpose, neither public nor private rights should stand in their way, but still they should make good to the public in another shape the means of passage over such ways as they were empowered to cut through." And the case of *Reg.* v. *Inhabitants of Isle of Ely* (3), where the inhabitants of the Isle of Ely, a division of the county of Cambridge, were held not liable to repair a bridge built by adventurers under similar circumstances, proceeded upon the same grounds. Patteson J., delivering the judgment of the Court, said (4): "Where the act making the bridge necessary, though authorized to be done, interferes with the public right, (*sic*) is done primarily for private purposes, and the public use from which the public benefit is inferred is to be referred only to the act, because made necessary by it, the public indeed remaining only with the same convenience which it had before, the authority to do the act is conditional only, equally whether the condition be expressed or implied; and the condition also is in both cases continuing so long as the act continues whereby the public right is interfered with." The same principle has been applied to railways. In *Oliver* v. *North*

(1) (1811) 14 East, 317.
(2) (1815) 3 M. & S. 526.
(3) (1850) 15 Q. B. 827.
(4) At p. 844. The wording is exactly the same in the *Law Journal* report, 19 L. J. (M.C.) at p. 232.

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Eastern Ry. Co. (1) it was held that where a railway company construct their line across a highway on a level under the sanction of an Act of Parliament it is their duty to keep the crossing in a proper state for the passage of carriages across the rails, and that if a carriage is damaged in consequence of the rails being too high above the surface of the roadway the company are liable. The defendants will rely on the case of *West Lancashire Rural Council* v. *Lancashire and Yorkshire Railway.* (2) There a railway company, being authorized to carry their railway across a high road upon the level, constructed the railway, as in the present case, at a slightly higher level than the road, and in order to bring the road up to the level of the railway raised it by means of inclined planes on either side of the railway under the powers conferred by s. 16 of the Railways Clauses Act, 1845; and it was held by Wright J. that there was no obligation upon the railway company to repair the roadway upon the inclined planes. But that decision turned wholly upon the construction of s. 16, which merely authorized the company to construct inclined planes and from time to time to repair them, without imposing any obligation to do so. It amounted to nothing more than that permissive words cannot be read as creating a liability. The point that there was a duty to repair at common law and independently of the statute was never taken. The question of the implied condition of the exercise of the authority to make the inclined planes was not discussed.

Bankes, K.C., and *Courthope Munroe*, for the defendants. The case is covered by the authority of *West Lancashire Rural Council* v. *Lancashire and Yorkshire Railway.* (2) That case was no doubt decided upon the construction of the Railways Clauses Act alone, and rightly so, for the common law doctrine relied upon by the present plaintiffs did not there apply. That doctrine only applies where the Act authorizing the interference with a high road is wholly silent as to repairs and omits to impose upon the undertakers an obligation to repair under any circumstances; in which case the omission must be treated as unintentional, and it must be presumed that the Legislature intended the exercise of the authority to be subject to the

(1) (1874) L. R. 9 Q. B. 409. (2) [1903] 2 K. B. 394.

condition that the undertakers should do the necessary repairs. That was the ground upon which the several cases cited under navigation Acts were decided. But where the Act authorizing the interference requires the company to repair the roadway in certain specified cases, its omission to require them to do so in other cases is presumed to be intentional—inclusio unius exclusio alterius. This is the case with railway Acts which incorporate the Railways Clauses Act, 1845. That Act is to be regarded as a code specifying the extent of the obligations of all the railways to which it applies. If indeed it were otherwise, and if the common law doctrine applied to railways, there would be an obligation upon every railway company who, in carrying a railway over a highway by a bridge, lowered the level of the highway to repair the slope of the road. It has been held that in that state of things there is no liability upon the company under the Railways Clauses Act: *Waterford and Limerick Ry. Co.* v. *Kearney* (1); *Fosberry* v. *Waterford and Limerick Ry. Co.* (2); *London and North Western Ry. Co.* v. *Skerton* (3); but in none of those cases did it apparently occur to the minds of any of the judges deciding them that there would have been in another form of proceeding a liability at common law independently of the statute, nor has any attempt ever been made by a local authority to enforce such a liability. It is true that the defendants' railway in the present case is not governed by the Railways Clauses Act, having been made before that Act was passed. But the defendants' special Act is, like the Railways Clauses Act, a code. In certain specified cases it requires the company at all times to maintain the works constructed by them; in other cases it only requires them to construct and is silent as to maintenance. In s. 102, which deals with the case of the railway crossing a highway, it is provided that "where the said railway shall cross any public bridleway or footpath in any other manner than on the level the said company shall make and maintain convenient ascents and descents as the case may be to such bridleway or footpath." Where, however, the road is crossed by the railway on the level the Legislature thought the

(1) (1860) 12 Ir. C. L. R. 224. (2) (1862) 13 Ir. C. L. R. 494.
(3) (1864) 5 B. & S. 559.

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public would be sufficiently protected by the obligations, if any, which the justices might think fit to impose as a condition of their consent to the railway so crossing the road. The express obligation to repair the approaches in the one case excludes the intention of the Legislature to impose such an obligation in the other. There are also various other sections in the Act imposing in certain special cases an obligation to keep the roadway of approaches to bridges, &c., in repair. This indicates that the company were intended to repair approaches only in those cases in which they were expressly required to do so by the Act. [They also referred to *London and North Western Ry. Co.* v. *Ogwen District Council.* (1)]

R. D. Muir, in reply. *London and North Western Ry. Co.* v. *Skerton* (2) was decided on the words of the Railways Clauses Act alone. It is reasonable that the railway company who substitute an inclined plane for a level road should have to repair the surface of the former, because, as Pollock C.B. observed in *Leech* v. *North Staffordshire Ry. Co.* (3), "in wet weather it is of course more expensive to repair the ascent up and the descent down, the rain carrying the soil away; and because in two sides of a triangle there is a greater surface to repair."

Cur. adv. vult.

Dec. 19. JELF J. read the following judgment:—This was a special case raising an important question as to the obligation on the part of railway companies to maintain and keep in repair the highways over "level crossings," including the approaches on either side thereof. The plaintiffs are the highway authority responsible under the Local Government Act, 1888, for the repair of the main roads in the county of Hertford, including certain highways which are crossed by the defendants' railway near Sawbridgeworth Station, near Spellbrook Hamlet, and near South Mill, Bishop's Stortford, "on the level." The defendants are the owners of a railway made by the Northern and Eastern Railway Company under the authority of a special Act of Parliament passed in the year 1836 (6 & 7 Will. 4, c. ciii.). By

(1) (1899) 80 L. T. 401. (2) 5 B. & S. 559.
(3) (1860) 29 L. J. (M.C.) 150, at p. 152.

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s. 31 of that Act the said company were empowered, amongst other things, to take land and to remove earth, &c., for making the railway authorized by that Act, and "to make or construct upon across under or over the said railway . . . . such inclined planes . . . . bridges roads ways . . . . as the company shall think proper . . . . and also to divert or alter the course of any roads or ways or to raise or sink any roads or ways in order the more conveniently to carry the same over or under or by the side of the said railway . . . . and also from time to time to alter repair or discontinue the before-mentioned works or any of them and to substitute others in their stead . . . . doing as little damage as may be . . . . and making full satisfaction in manner hereinafter mentioned." In the course of constructing the parts of such railway at such level crossings the company made their said railway, including the permanent way and ballasting thereof, at a higher level than that of the said original highways respectively crossed by the said railway, and, in order to bring the said highways respectively up to the level of the said railway and to render the highways continuous and without interruption from the difference in level between the railway and the original levels of the adjoining lengths of highways, and so as to restore their use, raised such adjoining lengths of highways respectively on either side of the said railway. The portions so raised are referred to as "the approaches." The said Northern and Eastern Railway Company erected gates by the side of the railway at each side of the said level crossings respectively. After various transfers the defendants, by virtue of 2 Edw. 7, c. xxii., became the owners of the said railway, and thenceforward were bound by and liable to all the obligations and liabilities of the Northern and Eastern Railway Company. The defendants and their predecessors have always maintained and kept in repair those portions of the respective highways being inside and between the gates above mentioned, and the defendants (according to a statement in the special case) admitted their liability to maintain and repair those parts. The said approaches and the highways thereon lying outside the gates aforesaid have been kept in repair and maintained by the defendants and their predecessors until shortly before the present action, when the

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defendants ceased to do so and disputed their liability in regard thereto. The said approaches and the highways thereon have never been kept in repair or maintained by the plaintiffs or their predecessors, who were previously the highway authorities within whose districts the said highways lay.

The question which I have to decide is whether the defendants ought of right and are bound to repair and keep in repair the said approaches and highways outside the gates aforesaid. The principle upon which Mr. Danckwerts for the plaintiffs based the obligation of the railway company to keep the approaches in repair was the common law principle that whenever a body of persons for their own benefit are authorized by statute to cut through a public road they are bound to do what is necessary to make and maintain and keep an equally convenient passage for the public; and at all events where the statute which authorizes the interference is silent as to what they are to do the authorities seem to establish this principle. *Oliver* v. *North Eastern Ry. Co.* (1) shews that if a level crossing is made under the authority of an Act of Parliament the company have the duty cast upon them of keeping such level crossing in a proper state for traffic. *Inhabitants of West Riding of Yorkshire* v. *The King* (2) recognizes a similar duty on the part of a county to repair the approaches to a bridge which they are bound to repair, because "those who are liable to repair a bridge are liable to give the public a means of access to it, otherwise they give nothing." (3) This was founded on the *Abbot of Coombe's Case* (4), where the defendant admitted a liability to repair two arches in the centre of a bridge, and it was held that that liability shewed that he was necessarily liable to repair the rest unless he could shew who was liable to do so. As to this Lord Eldon, in the passage in *Inhabitants of West Riding of Yorkshire* v. *The King* (3) above quoted, says: "It is hard doctrine I confess, but the argument is 'You are doing no good at all to the public if you repair two arches in the middle of the stream and show no way for the public to get at them.'" May it not be said with equal

(1) L. R. 9 Q. B. 409.
(2) (1813) 5 Taunt. 284.
(3) Ibid., per Lord Eldon L.C. at p. 299.
(4) (1370) Lib. Ass. 43 Edw. 3, pl. 37

force to the railway company in the present case, "You are doing no good to the public by repairing the part of the highway within the gates unless you also repair the part outside, which must be kept up to the same level as the raised part between the gates so as to enable the public to get on to and over that raised part and to use the road as they did before you came across it and created what otherwise would remain an obstruction and a nuisance upon it"? *Rex* v. *Kerrison* (1) also supports an implied obligation to make as good a passage as before under similar circumstances. *Rex* v. *Inhabitants of Kent* (2) decides that a statutory obligation to "leave" as convenient a way binds the proprietors to *keep* the same, when they have substituted a bridge for a ford which they have destroyed for their own benefit. *Rex* v. *Inhabitants of the Parts of Lindsey* (3) shews that the same principle applies to a bridge made by undertakers for their own benefit under similar circumstances. In *Reg.* v. *Inhabitants of Isle of Ely* (4) Patteson J. says: "The authority to do the act is conditional only, equally whether the condition be expressed or implied; and the condition also is in both cases continuing so long as the act continues whereby the public right is interfered with." This decision is in point both as to the obligation to repair in a case like the present and as to the obligation being co-extensive with the continuance of the obstruction created.

Mr. Bankes, on the other hand, contended for the defendants that the question of liability depends entirely on the construction of the statute, and that although the Railways Clauses Act, 1845, does not apply in this case, not having been passed when the railway was authorized in 1836, still the words of the special Act, 6 & 7 Will. 4, c. ciii., are practically the same, and that the decisions (to be presently mentioned) limiting the obligation of undertakers under the general Act apply mutatis mutandis to the present case. As to s. 31 he maintained that the works to be done by the company under that section were to be done once for all, and that there was no continuing liability. I see nothing in the section to support this contention. It is a section which enables the company to do all

(1) 3 M. & S. 526
(2) (1811) 13 East, 220.
(3) 14 East, 317.
(4) 15 Q. B. 827 at p 844

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kinds of things for their own benefit, but, except for the words "doing as little damage as may be," leaves the corresponding obligation undefined. Moreover, it is difficult to reconcile this contention with the admission made in the special case that they are bound to repair the part within the gates. Mr. Bankes felt this difficulty, and argued that all that was meant by the paragraph containing that admission was a limitation of the question of liability to the approaches. But counsel for the plaintiffs did not acquiesce in this limited construction, and I feel bound to take the admission to mean what it distinctly says. I therefore pressed Mr. Bankes for any logical reason why the part within the gates, and especially the part between the gates and the rails, should be repairable by the company and the part outside the gates not repairable by them, and I gathered that he was unable to give any reason for such distinction beyond suggesting that they had for their own traffic to keep the metals in repair.

Then he relied on ss. 102, 104, and 111. Sects. 102 and 104 seem to prohibit the crossing of any highway on a level by the railway without the leave of justices, and say nothing as to what is to be done for the public when such leave is obtained, but go on to provide that where a highway is crossed otherwise than on the level ascents and descents to such highway are to be made and *maintained* by the company. The argument that "Expressio unius exclusio alterius" hardly applies to this case; and, moreover, it proves too much, for if the section does not provide for approaches to level crossings being made and maintained, neither does it provide for a way over the obstacle itself, caused by the raising of the rails, being made and maintained, and yet, as the common law principle clearly shews, it could not be intended to allow the nuisance to exist as a permanent obstruction to be authorized. Again, these two sections may be construed more strictly to mean that, except where the crossing involves no interference at all with the level, all necessary ascents and descents, however slight, are to be made and maintained by the company. Nor does s. 111, in my opinion, assist the defendants' contention. It seems to be dealing chiefly with the making of substituted roads, either temporary or at all events entirely different from the road cut through, and, though it speaks in one part of the

principal road being restored, I am unable to find anything to oust the common law or implied obligation relied upon by the plaintiffs.

I now proceed to deal with the cases cited on behalf of the defendants. A decision of the late Mr. Justice Wright, *West Lancashire Rural Council* v. *Lancashire and Yorkshire Railway* (1), was relied on for the defendants as shewing that inclined planes made to carry a road over a railway which had been raised slightly above the level of the road under s. 16 of the Railways Clauses Act, 1845, were not repairable by the railway company. This, however, was argued entirely upon the construction of the Railways Clauses Act, which does not apply to the present case. The common law principle was not referred to, and none of the cases cited for the plaintiffs in this case were mentioned. The authority relied upon by Wright J. was *London and North Western Ry. Co.* v. *Skerton* (2), in which the judges with very considerable doubt followed two Irish cases—*Fosberry* v. *Waterford and Limerick Ry. Co.* (3), affirming the decision of the majority of the Court in *Waterford and Limerick Ry. Co.* v. *Kearney.* (4) These three cases, however, turned upon the question whether a road lowered by the railway company to enable a railway bridge to pass over it was or was not a "necessary work" within the meaning of s. 46 of the Railways Clauses Act, 1845. I do not think any of the four last-mentioned cases bind me in regard to the question which I have to decide, for they depend upon the exact words of the enactments with which they were dealing. I must add that in my humble judgment they are very hard to reconcile with the other clear cases which I have quoted. Moreover, the general principle contended for by the plaintiffs is, I think, supported by the case of *North Staffordshire Ry. Co.* v. *Dale* (5), and still more by the obiter dictum of Pollock C.B. in *Leech* v. *North Staffordshire Ry. Co.* (6) about the greater tendency of the lowered road to become wet and out of repair. In *London and North Western Ry. Co.* v. *Ogwen District Council* (7) the road in respect of which the decision was given

(1) [1903] 2 K. B. 394.
(2) 5 B. & S. 559.
(3) 13 Ir. C. L. R. 494.
(4) 12 Ir. C. L. R. 224.
(5) (1858) 8 E. & B. 836.
(6) 29 L. J. (M.C.) 150, at p. 152.
(7) 80 L. T. 401.

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was in a completely different place from the place where the line crossed the original road.

I was referred by Mr. Bankes to the remarks of Swinfen Eady J. in *Hertfordshire County Council* v. *New River Co.* (1), where he distinguishes between cases in which the statute requires a substitute for the road interfered with so as to make a way as convenient as it was before the interference and cases in which the statute is silent as to any substituted provision and the company are bound by the common law. But the principle appears to me to be the same in both cases, at least so far as it affects the present case, and except in cases where the statute has clearly negatived the common law principle: see in this connection the case of *Reg.* v. *Inhabitants of Isle of Ely* (2), quoted above.

Having now reviewed all the cases which have been brought to my notice, I am of opinion, both upon principle and authority, that the defendants ought of right and are bound to repair and keep in repair the said approaches lying outside the gates as well as the parts of the highway between the gates. The extent of such approaches is shewn on the agreed plans attached to the special case, and I order that the defendants forthwith repair and henceforth keep in repair the same accordingly.

Judgment for the plaintiffs.

Solicitors for plaintiffs: *J. N. Mason & Co., for Sworder & Longmore, Hertford.*

Solicitor for defendants: *E. Moore.*

(1) [1904] 2 Ch. 513, at p. 519. (2) 15 Q. B. 827, at p. 844.

J. F. C.

[COURT OF CRIMINAL APPEAL.]

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Nov. 27.

THE KING *v.* BRIGGS.

Criminal Law—Validity of Sentence—Habitual Drunkard—Conviction for being guilty of disorderly behaviour while drunk—Three previous Summary Convictions for Offences involving Drunkenness—Power to order Imprisonment in addition to Detention—Inebriates Act, 1898 (61 & 62 *Vict. c.* 60), *s.* 2, *sub-s.* 1.

By the Inebriates Act, 1898, s. 2, sub-s. 1, "Any person who commits any of the offences mentioned in the First Schedule to this Act, and who within the twelve months preceding the date of the commission of the offence has been convicted summarily at least three times of any offences so mentioned, and who is a habitual drunkard, shall be liable upon conviction on indictment, or if he consents to be dealt with summarily on summary conviction, to be detained for a term not exceeding three years in any certified inebriate reformatory the managers of which are willing to receive him":—

Held, that where a person is convicted on an indictment preferred against him under the section a sentence of imprisonment with hard labour cannot be inflicted upon him in addition to the detention in a certified inebriate reformatory authorized by the section.

APPEAL by Robert Briggs against a sentence passed upon him at the Lancaster quarter sessions on October 19, 1908.

On November 21 the Court of Criminal Appeal granted leave to the prisoner to appeal against the sentence in so far as its legality was concerned, and the appeal was entered pursuant to that leave. The indictment, which was preferred under s. 2, sub-s. 1, of the Inebriates Act, 1898, was in the following terms:—

Lancashire to wit.

"The jurors for our Lord the King upon their oath present that Robert Briggs on the twenty-third day of September in the year of our Lord one thousand nine hundred and eight was unlawfully guilty while drunk of disorderly behaviour in a certain public highway to wit County Square situate at Ulverston in the said county against the form of the statutes in such case made and provided.

"And the jurors aforesaid upon their oath aforesaid do further present that the said Robert Briggs within the twelve months next preceding the commission of the offence hereinbefore charged and stated was summarily convicted four times of certain offences

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mentioned in the First Schedule of the Inebriates Act 1898 to wit on the twenty-ninth day of May in the year of our Lord one thousand nine hundred and eight before a Court of summary jurisdiction sitting at Ulverston in and for the said county for that he the said Robert Briggs was found unlawfully drunk on the twenty-eighth day of May in the year of our Lord one thousand nine hundred and eight in a certain public place situate at Ulverston in the said county.

"And on the ninth day of June in the year of our Lord one thousand nine hundred and eight before a Court of summary jurisdiction sitting at Cartmel in and for the said county for that he the said Robert Briggs was unlawfully guilty while drunk of disorderly behaviour on the eighth day of June in the year of our Lord one thousand nine hundred and eight in a certain public place situate at Holher Upper in the said county.

"And on the sixteenth day of July in the year of our Lord one thousand nine hundred and eight before a Court of summary jurisdiction sitting at Ulverston in and for the said county for that he the said Robert Briggs was unlawfully guilty while drunk of disorderly behaviour on the third day of July in the year of our Lord one thousand nine hundred and eight in a certain public place situate at Ulverston in the said county.

"And on the thirteenth day of August in the year of our Lord one thousand nine hundred and eight before a Court of summary jurisdiction sitting at Ulverston in and for the said county for that he the said Robert Briggs was unlawfully guilty while drunk of disorderly behaviour on the twelfth day of August in the year of our Lord one thousand nine hundred and eight in a certain public place situate at Ulverston in the said county.

"And the jurors aforesaid upon their oath aforesaid do further present that the said Robert Briggs is a habitual drunkard within the meaning of the second section of the Inebriates Act 1898."

The prisoner, having pleaded not guilty, was tried and found guilty by the jury of the offence first charged in the indictment. Further evidence was then admitted, and he was also found guilty of having been three times previously convicted within twelve months, and also of being a habitual drunkard, and was sentenced

to fourteen days' hard labour for the offence first charged in the indictment. At the end of that period he was to be detained in an inebriate reformatory the managers of which were willing to receive him.

Wimpfheimer, for the prisoner. The sentence is illegal, inasmuch as under s. 2, sub-s. 1, of the Inebriates Act, 1898 (1), the only sentence that can be inflicted on the prisoner is that he be "detained for a term not exceeding three years in any certified inebriate reformatory the managers of which are willing to receive him."

The indictment contains, in law, only one count. It is laid under s. 2, sub-s. 1, of the Act of 1898, which creates a compound offence made up of several offences: *Rex* v. *Penfold*. (2) It was not necessary that the prisoner should have had two trials. The whole indictment might have been placed before the jury at once. The maximum sentence that can be inflicted under s. 2, sub-s. 1,

(1) Inebriates Act, 1898, s. 1, sub-s. 1: "Where a person is convicted on indictment of an offence punishable with imprisonment or penal servitude, if the Court is satisfied from the evidence that the offence was committed under the influence of drink or that drunkenness was a contributing cause of the offence, and the offender admits that he is or is found by the jury to be a habitual drunkard, the Court may, in addition to or in substitution for any other sentence, order that he be detained for a term not exceeding three years in any State inebriate reformatory or in any certified inebriate reformatory the managers of which are willing to receive him."

Sect. 2, sub-s. 1: "Any person who commits any of the offences mentioned in the First Schedule to this Act, and who within the twelve months preceding the date of the commission of the offence has been convicted summarily at least three times of any offences so mentioned, and who is a habitual drunkard, shall be liable upon conviction on indictment, or if he consents to be dealt with summarily on summary conviction, to be detained for a term not exceeding three years in any certified inebriate reformatory the managers of which are willing to receive him."

The following offence is among those mentioned in the First Schedule to the Act:—

Description of Offence.	Statute enacting offence.
Being guilty while drunk of riotous or disorderly behaviour in a highway or other public place whether a building or not.	Licensing Act, 1872 (35 & 36 Vict. c. 94), s. 12.

(2) [1902] 1 K. B. 547.

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of the Inebriates Act, 1898, is detention for three years in a certified inebriate reformatory. There is no power to inflict hard labour.

Singleton, for the prosecution. The indictment contains three separate counts. The first charges the prisoner with having been unlawfully guilty while drunk of disorderly behaviour, the second with having, within twelve months preceding the date of the commission of the offence charged in the first count, been summarily convicted at least three times of offences mentioned in the First Schedule to the Inebriates Act, 1898, and the third with being a habitual drunkard. On that indictment the prisoner must first be tried for being drunk and disorderly. Until the jury have returned their verdict on that count the charges contained in the two remaining counts cannot be placed before them. There is a separate charge in each separate count, and separate sentences can be given on the separate counts. The charge contained in the first count of being guilty while drunk of disorderly behaviour in a highway is punishable under s. 12 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), by imprisonment with or without hard labour for any term not exceeding one month. There was therefore power to sentence the prisoner to fourteen days' hard labour on that count. There is nothing in s. 2 of the Inebriates Act, 1898, which takes away the power to inflict imprisonment conferred by s. 12 of the Licensing Act, 1872. If there is no power to inflict imprisonment on the present indictment, a person found guilty on the first count and not guilty on the remaining counts could not be punished by the Court before which the trial took place, although he had been convicted of a statutory offence. In the present case the prisoner will not have been punished for the subsequent offence of being drunk and disorderly if the sentence of imprisonment is invalid. There is no reason why a Court of quarter sessions should not have the same power to punish a person for being drunk and disorderly as a Court of summary jurisdiction has under s. 12 of the Licensing Act, 1872. It is clear that under s. 1, sub-s. 1, of the Inebriates Act, 1898, there is power to inflict imprisonment in addition to detention in a reformatory, and it was the intention of the Legislature that s. 2, sub-s. 1, should have the same effect

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The only material difference between their provisions is that s. 1, sub-s. 1, contains the words "in addition to or in substitution for any other sentence," which are omitted in s. 2, sub-s. 1. Time is required for making inquiries as to a convenient inebriate reformatory the managers of which are willing to receive the prisoner, and there would therefore have been express power given by s. 2, sub-s. 1, of the Act of 1898 to detain him if there were no power to imprison him. [*Commissioner of Police* v. *Donovan* (1); the Industrial Schools Act, 1866 (29 & 30 Vict. c. 118); the Reformatory Schools Act, 1893 (56 & 57 Vict. c. 48); the Youthful Offenders Act, 1901 (1 Edw. 7, c. 20); and the Prevention of Cruelty to Children Act, 1904 (4 Edw. 7, c. 15), were also referred to.]

Wimpfheimer, in reply. As to finding a convenient inebriate reformatory, the Court can remand the prisoner till that has been done. Sentence could be postponed. In the present case the sentence being bad in part is bad altogether.

The judgment of the COURT (Lord Alverstone C.J., Phillimore and Walton JJ.) was delivered by

LORD ALVERSTONE C.J. In this case the sole question for our decision is whether or not, when a person has been convicted under s. 2 of the Inebriates Act, 1898, he can, in addition to being detained for some term not exceeding three years in a certified inebriate reformatory willing to receive him, be also sentenced to undergo a term of imprisonment with hard labour. It seems to me we must decide the question of law as to whether this was or was not a legal punishment. In our opinion it was not. At the trial the indictment was dealt with as if it contained a count for being drunk and disorderly, and further counts, framed upon s. 1, sub-s. 2, of the Inebriates Act, 1898, of having been convicted at least three times of one of the offences mentioned in the First Schedule to that Act. Applying the principle which in certain cases rests upon statute that a prisoner shall only be arraigned on so much of the indictment as charges him with the particular offence, and that the question of the previous conviction shall not be tried until after he has been convicted of

(1) [1903] 1 K. B. 895.

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the subsequent offence, the Court below, in the interest of the prisoner, did not go into the question of the previous convictions until the prisoner had been found guilty of the offence charged in the first count. Our decision ought not to depend on the way in which the trial has been conducted, but on the question whether or not s. 2 of the Inebriates Act, 1898, is an enactment dealing with a particular state of circumstances. I am pressed by the fact that, according to the practice which has existed for many years, in and prior to the year 1898 persons were not tried on indictment for being drunk and disorderly. I do not say that it may not be possible to frame an indictment for that offence, because the Licensing Act, 1872, s. 12, provides that a person who is guilty while drunk of disorderly conduct in a highway shall be liable to a penalty. That section must, however, be read together with s. 51 of the Act of 1872, which clearly contemplates that summary proceedings can be taken in respect of the offence. It was doubtless for that reason that conviction on indictment for being drunk and disorderly was in the practical administration of the criminal law unknown in the year 1898. Sect. 2, sub-s. 1, of the Inebriates Act, 1898, provides that a person who commits any of the offences mentioned in the First Schedule to the Act, and who within the twelve months has been convicted summarily three times of any of the offences so mentioned and who is a habitual drunkard, shall be liable upon conviction on indictment to be detained. Four of the offences in Sched. I. are those mentioned in the Licensing Act, 1872, s. 12—being found drunk in any highway or other public place, being guilty while drunk of riotous or disorderly behaviour, being drunk while in charge of a carriage or horse or steam engine, or being drunk while in possession of loaded firearms. Then there follow a number of other offences connected with drunkenness under the Town Police Clauses Act, 1847, the Merchant Shipping Act, 1894, and certain Scotch and Irish statutes. In my judgment the object of s. 2, sub-s. 1, of the Inebriates Act, 1898, was to give the Courts power for the first time to detain a person for a period not exceeding three years against whom all those things were proved, namely, the commission of one of the offences mentioned

in the First Schedule to the Act, a conviction for at least three times of one of those offences, and of being a habitual drunkard. That view is confirmed by the language of the Inebriates Act, 1898, where, dealing with a more serious class of offence, namely, where a person is convicted on indictment of an offence punishable with imprisonment or penal servitude, which might include manslaughter and other very serious offences, if the Court is satisfied that the offence was committed under the influence of drink, or that the drunkenness was a contributing cause to the offence, and the offender admits that he is or he is found by the jury to be a habitual drunkard, the Court may, in addition to or in substitution for any other sentence, order that he be detained for a term not exceeding three years. In s. 2, sub-s. 1, the words "in addition to or in substitution for" are not used. In my judgment the absence of any indication that the person is to be punished in addition to being detained shews that the particular punishment intended to be inflicted under that state of circumstances is provided in s. 2, sub-s. 1, namely, detention for a term not exceeding three years in any certified inebriate reformatory the managers of which are willing to receive him. On behalf of the prosecution it was suggested that, if that is the true construction of s. 2, sub-s. 1, a difficulty may arise inasmuch as, although the jury may have returned a verdict of guilty upon the whole indictment, the Court before which the trial takes place would have no power to detain the prisoner while inquiries are being made as to a suitable inebriate reformatory. In the first place, the practical answer to that objection is that, if persons elect to prosecute under this section, inasmuch as the prisoner must on conviction be sent to a certified inebriate reformatory, they must come prepared with the name and situation of a reformatory the managers of which are willing to receive him, and that those who put the criminal law in motion will recognize that, if this procedure is to be effective, they must be so prepared. Failing that, I can only say that the course which I have adopted in similar cases is to ascertain from the governor of the gaol whether there is a reformatory or asylum willing to receive the prisoner and postpone judgment until the fact is ascertained. Some day we may have to deal

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with the question whether a prisoner has been lawfully detained or not, but it is not material in construing the section with regard to the question as to the punishment which may be inflicted. The difficulty does not arise here, because the prisoner is already in a home where he will be properly looked after. He has, through no fault of his own, undergone a sentence of thirteen days' hard labour. Those days, of course, can count. We cannot restore to him anything which he has lost by having to do hard labour; but at any rate, if he has suffered, he must bear that slight inconvenience. The order that we make is that he be detained in the inebriate home where he now is for three years from the date of the conviction. That is the sentence which the Court ought to have passed and the sentence which we now pass.

Sentence varied.

Solicitor for prisoner: *The Registrar of the Court of Criminal Appeal.*

Solicitors for prosecution: *Snow, Fox & Higginson, for H. E. Clare, Preston.*

J. E. A.

[IN THE COURT OF APPEAL.]

C. A.
1908
Dec. 9, 10, 17.

DITTMAR *v.* OWNERS OF SHIP V 593.

Employer and Workman—Compensation—Execution by Contractor of Work undertaken by Principal—Liability of Principal—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 4, *sub-ss.* 1 *and* 4.

A limited company carried on the business of coal merchants in various parts of the world, including Cape Verd, and, as incidental to that business, the business of lightermen, and they purchased in England a lighter for use in their business at Cape Verd. By an agreement entered into between the company and G., G. agreed for a lump sum to navigate the lighter from England to Cape Verd and deliver her into the company's hands there, and to provide and pay for the crew, and the company agreed to pay all demands for insurance, also clearances at the port of departure. B., who was appointed by G. to take command of the lighter, engaged the crew. The boatswain, who was incapacitated by an accident on the voyage, applied against the company for compensation under the Workmen's Compensation Act, 1906 :—

Held, that the company in the course or for the purposes of their business had contracted with G. for the execution by or under G. of part of the work undertaken by them and were liable as principals under s. 4, sub-s. 1, of the Act.

Appeal from an award of the judge of the City of London Court sitting as arbitrator under the Workmen's Compensation Act, 1906.

Wilson, Sons & Co., Limited, were incorporated under the Companies Acts in 1877. The objects of the company as set out in clause 3 of the memorandum of association were, so far as material, as follows :—

"(A) To purchase, or otherwise acquire the trade and business of general merchants, shipping and commission agents, coal merchants and contractors, now carried on in London by Messrs. Wilson, Sons & Co., and the similar trade and business now carried on in Rio de Janeiro by Messrs. E. P. Wilson & Co., in Bahia by Messrs. Wilson & Co., and in Pernambuco by Messrs. Wilson Brothers & Co. (which three last-mentioned businesses include, in addition to the particulars specified as to the said London business, as well the business of banking

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and exchange, and that of dealers in and shippers of produce, dockowners, lightermen, bonded warehousemen, and wharfingers), and the goodwill of the said businesses respectively; . . . .

"(B) To carry on the businesses in the last preceding clause respectively described, and generally to carry on in England, Brazil and elsewhere, the businesses of general merchants and dealers in produce, shipowners, shipping and commission agents, coal merchants and contractors, and also any business of the nature described in such clause."

(C) included amongst other objects "generally to carry on in England, Brazil and elsewhere, the business of colliery owners, coal masters and coal contractors."

"(J) To charter, purchase, or otherwise acquire, build, equip, and maintain any steam or other vessels, tugs, lighters, dredgers, or other shipping appliances, and to make, acquire, maintain and work any railways, tramways, or other roads or ways respectively necessary or useful for the purposes of the company's business."

The company carried on the business of colliery proprietors and coal merchants and had coal depots in various parts of the world, and they owned lighters for use at the different coaling stations. One of the company's depots was at St. Vincent in the Cape Verd Islands. Early in 1908 the company purchased two new lighters, V 593 and another, which were built for them at Stockton-on-Tees, for their use at St. Vincent.

By a contract dated March 17, 1908, between the company, therein described as owners, and J. A. Glover, in consideration of the sum of 192*l.* 10*s.* Glover agreed to take command of the sailing lighter V 593 and to take the vessel under sail from Stockton-on-Tees to the port of St. Vincent and deliver the same into the hands of the company there, fire and the dangers and accidents of the seas only excepted. He further undertook to provide an efficient crew and out of his moneys to pay all wages (and other claims, if any) of the crew and to indemnify the owners against all claims of the crew for wages or for passage money back to England or otherwise in consequence of the voyage, and also at his own expense to supply the vessel with consumable deck stores, pantry utensils, and provisions necessary

for the voyage; and the owners agreed to pay and satisfy all demands for insurance, also clearances at port of departure.

A similar contract was entered into between the company and Glover with respect to the other lighter. Glover took command of this second lighter and he appointed one Barton to take command of V 593 and to find the crew.

Max Dittmar was engaged by Barton as boatswain for the voyage under the ordinary Board of Trade agreement, which gave the name of Wilson, Sons & Co. as the registered managing owners of the vessel.

On May 10, 1908, while the lighter was off the North Goodwins, the mainsail flapped and knocked over Dittmar as he was about to take the midnight watch and seriously injured him. The lighter then put into Ramsgate, and Dittmar was sent to the hospital. The lighter remained at Ramsgate for refitting until May 31, when Dittmar rejoined. In July, on his return to England, Dittmar applied for compensation under the Workmen's Compensation Act, 1906, against the company as representing the owners. The company denied liability upon the grounds (1.) that Dittmar was not in their employment and (2.) that the contract of March 17 was not a contract entered into by the company in the course of or for the purposes of their trade or business for the execution of work undertaken by them within s. 4.

The learned county court judge took the view that, inasmuch as under the Merchant Shipping Act, 1894, the owner of the ship was liable to be sued by a seaman for his wages and was bound to defray the expense of providing surgical and medical attendance if a seaman was injured in the service of the ship, it was inconsistent that the owner should have to pay these expenses under the Merchant Shipping Act and not be liable to pay compensation under the Workmen's Compensation Act, 1906, having regard to the terms of s. 7 of the latter Act. In his judgment the applicant was not in the employment of Glover or Barton, but was in the employment of Wilson, Sons & Co., and he assessed the compensation at 1*l.* weekly from the date of the return to England till further order.

The company appealed.

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J. A. Hamilton, K.C., and *W. Shakespeare*, for the appellants. The learned county court judge based his decision on the construction of the Merchant Shipping Act, 1894, and held that inasmuch as the appellants were registered owners of the ship Dittmar had contracted with them and was in their service, and therefore that they were liable under the Workmen's Compensation Act, 1906, but he has misapprehended the effect of the Merchant Shipping Acts. Under s. 34 of the Merchant Shipping Act, 1906, the expenses of a seaman who is ill or dies may be recovered against the owner; but there is nothing in the Act which enables a seaman independently of his contract to bring an action for wages against the owner of the ship. A registered owner who has parted under a charter-party with the possession of the ship and all control over her and her crew is not liable upon an allotment note directed to the charterer, and drawn by the master, who has been appointed by the charterer and has engaged the crew: *Meiklereid* v. *West*. (1) That is still the law under s. 143 of the Act of 1894. Unless there was a contract of employment between Dittmar and the appellants he cannot succeed. The judge has held, not that there was such a contract in fact, but that under the Act he is entitled to sue. The appellants had parted with all control over the ship and cannot be liable for the contracts of third parties. The use of the word "owner" is not conclusive. The Court will look at the context to see what is meant by the word "owner" in any particular section of the Act: *Sir John Jackson, Ld.* v. *Owners of Steamship Blanche* (2), where *Meiklereid* v. *West* (1) was approved. It is not necessary to shew that the charter was by demise, though that is one way of establishing that the owner is under no liability. A contract must be proved. In the present case the articles only shew a contract between Dittmar and Barton; and Barton was not the appellants' agent, but Glover's. The liability to pay wages to a seaman depends on who has employed him. Under s. 164 a seaman can only recover wages from the person with whom the contract was made. He can only sue the person who appears on the register as owner provided that person was privy to the contract: *Hibbs* v. *Ross*. (3)

(1) (1876) 1 Q. B. D. 428. (2) [1908] A. C. 126.
(3) (1866) L. R. 1 Q. B. 534.

The production of the register is not in itself sufficient to shew that the captain had authority to make contracts of service for the owner. It is in order that a title may depend on the register that the ownership has to be registered and a certificate issued by the registrar which may be used as evidence. The duties of managing owners as defined by ss. 426 and 696 do not affect this point; so the statement in the articles that the appellants are managing owners is immaterial: *Baumwoll Manufactur Von Carl Scheibler* v. *Furness*. (1) The learned judge relied on *Button* v. *Thompson* (2), but the only question in that case was for how long a period of service the seaman had contracted.

Under the Workmen's Compensation Act, 1906, the relationship of employer and workman does not exist unless there is a contract between them: s. 1, sub-s. 1; s. 7, sub-s. 1; s. 13. This is not a case of sub-contracting within s. 4, for that only applies where a person who has contracted to do work for somebody else sub-lets part of the work to another. Here the appellants have not undertaken to do any work for other persons. Again, navigating the lighters down the English coast was not in the course of or for the purposes of the appellants' trade or business within s. 4. It cannot be said that a man who has a house built for his place of business is within the section.

[COZENS-HARDY M.R. referred to *Andrews* v. *Andrews and Mears*. (3).]

That decision is in the appellants' favour. At all events the findings in this judgment are not sufficient to enable the applicant to say he is within s. 4. The section is only meant to impose liability in respect of something which is itself part of the business. The purchase and navigation of lighters is no more part of a coal merchant's business than is the hauling of his trucks on a railway. This accident did not occur in or about the appellants' premises within s. 4, sub-s. 4, nor in any work which they had undertaken.

J. A. Simon, K.C., E. G. Kimber, and *H. C. Swan* (called upon to argue the question under s. 4 of the Workmen's Compensation Act, 1906, only), for the applicant. The Act of 1906 has effected

(1) [1893] A. C. 8. (2) (1869) L. R. 4 C. P. 330.
(3) [1908] 2 K. B. 567.

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a change in the law. Formerly anything that was merely ancillary to the work was not part of the business. Now it is only necessary to shew that the work was for the purpose of the business. Here the appellants had a place of business at St. Vincent and they owned in this country a ship which they wanted to get to St. Vincent. Instead of employing their own servants they employed other persons. In the contract the appellants were described as owners. This was not a charter by demise; but even if it was, it was only for the purpose of conveying the lighter to St. Vincent for their business. The appellants insured the lighters and paid the premiums. Therefore this is within s. 4. In *Andrews* v. *Andrews and Mears* (1) there was no evidence that the cart belonged to the principal, whereas here the lighter did belong to the appellants. When the old rule was extended by s. 4 the limit as to place was left unaltered because it would not have been fair to the principal to remove the limit. The section covers any work done on the premises or under the eye of the principal.

Assuming that the contract falls within s. 4, sub-s. 1, the ship was premises under the control of the appellants, and therefore they cannot bring themselves within the exception in sub-s. 4. [With respect to the meaning of "premises" they referred to *Beacon Life and Fire Assurance Co.* v. *Gibb.* (2)]

Shakespeare, in reply. The appellants are coal merchants and not shipowners, and navigating this new lighter from England to St. Vincent was no part of their business and was not work undertaken by them. The word "undertaken" in s. 4, sub-s. 1, limits the generality of the earlier words of the sub-section "in the course of or for the purpose of his trade or business"; otherwise a trader would never be able to define the sphere of his liability. The mere fact that the appellants have power under their memorandum of association to do a particular thing does not shew that they have in fact undertaken it. Navigating a lighter under the circumstances existing in this case is an absolutely distinct business from moving a lighter about a harbour for the purpose of supplying coal to a ship. In the latter case no doubt the appellants might be made liable under s. 4. That

(1) [1908] 2 K. B. 567. (2) (1862) 1 Moo. P. C. (N.S.) 73.

section was enacted to get rid of the decision of the Court in *Bush* v. *Hawes* (1), but it was not intended to affect *Wrigley* v. *Bagley & Wright.* (2)

Cur. adv. vult.

Dec. 17. COZENS-HARDY M.R. This appeal raises the question of the liability of owners of a lighter to pay compensation to a sailor who was injured during the navigation of the lighter from Stockton to Cape Verd. The respondents denied their liability under the Act, whether as employers of the workman or under s. 4. The county court judge decided in favour of the sailor on the first ground, holding that certain sections of the Merchant Shipping Act bound the Court to hold that the respondents, as owners, were the employers, and as such liable to pay compensation, and he did not consider the second point. In the view which I take it is not necessary to express any opinion upon the first point, for I think s. 4 applies.

The material facts are as follows. The appellants, Wilson, Sons & Co., Limited, are a company carrying on business as coal merchants and lightermen in England and elsewhere, including Cape Verd. The business of lightermen is mentioned among the first objects of the company, and the memorandum of association expressly authorizes the purchase of lighters. Lighter V 593 was purchased by the appellants in England for use in their business at Cape Verd. Not being minded themselves to undertake the navigation, they entered into a contract, dated March 17, 1908, with Glover by which, in consideration of 192*l.* 10*s.*, Glover agreed with the appellants (described as "owners") on receipt of written instructions to take the lighter from Stockton to the port of St. Vincent, Cape Verd, and deliver her to the owners' house there. Glover was to provide an efficient crew and pay their wages and to indemnify the owners against any claims of the crew. The owners were to pay and satisfy all demands for insurance, also clearances at port of departure. The accident happened during rough weather off Ramsgate.

(1) [1902] 1 K. B. 216. (2) [1901] 1 K. B. 780; [1902] A. C. 299.

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In these circumstances I think the appellants in the course or for the purposes of their trade or business contracted with Glover for the execution by or under Glover of part of the work proper to their undertaking, and in that sense undertaken by them, so that the case falls within the precise terms of s. 4, sub-s. 1. It has been held by this Court (*a*) that the section is not limited to the case of a sub-contract, and (*b*) that a vessel may be "premises" within s. 4, sub-s. 4. This being so, I think s. 4, sub-s. 4, has no application, for the accident occurred on the lighter, which was under the control or management of the owners except so far as the contract with Glover took it out of their control or management. Moreover, the lighter itself was the very thing the navigation of which was undertaken.

For these reasons I think the decision of the learned judge was correct. I refrain from expressing any opinion as to the effect of this very difficult section where the facts may be different, and I base my decision entirely upon the very peculiar conditions of the present case. The appeal must be dismissed with costs.

FLETCHER MOULTON and FARWELL L.JJ. concurred.

Appeal dismissed.

Solicitors: *Ince, Colt & Ince; Charles H. Downes.*

H. B. H.

BURTON, Appellant *v.* NICHOLSON, Respondent. 1909 *Jan.* 12.

Motor Car—Tramcar proceeding in same Direction—Motor Car passing Tramcar — Duty to pass on off side — "Carriage" — Motor Cars (Use and Construction) Order, 1904, *arts.* 1, 4 (3.).

By art. 1 of the Motor Cars (Use and Construction) Order, 1904, "In this order the expression 'carriage' includes a waggon, cart, or other vehicle." By art. 4, "Every person driving or in charge of a motor car when used on any highway shall comply with the regulations hereinafter set forth; namely . . . . (3.) He shall, when meeting any carriage, horse, or cattle, keep the motor car on the left or near side of the road, and when passing any carriage, horse, or cattle proceeding in the same direction, keep the motor car on the right or off side of the same."

A tramcar running on tramway rails in a highway is a "carriage" within the meaning of the above order, and therefore a motor car, when passing a tramcar proceeding in the same direction, must pass it on the right or off side thereof.

Case stated by the stipendiary magistrate for Bradford.

An information was preferred by the respondent, an inspector of police, under art. 4 of the Motor Cars (Use and Construction) Order, 1904, against the appellant, for that he (the appellant) on May 23, 1908, at Bradford, being a person driving a motor car on a certain highway, when passing a carriage proceeding in the same direction, unlawfully did fail to keep the motor car on the right or off side of the same.

At the hearing of the information the following facts were admitted or proved:—On May 23, 1908, the appellant was driving a motor car on a highway in Bradford. At the same time an electric tramcar was running on fixed lines on the highway and going in the same direction as the motor car, but it had stopped temporarily at a fixed stopping place to discharge and take up passengers. The tram lines at the place in question were double lines of tramway, and at the same time another electric tramcar, going in the opposite direction, had also stopped temporarily at the same stopping place to discharge and take up passengers, the two tramcars being alongside each other at the time. While the tramcars were so temporarily stopped

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the appellant drove his motor car past the first-mentioned tramcar (that is, the one on its journey in the same direction) on the left or near side of the tramcar. At the point in question there was ample space for the motor car to pass on the highway on either side of the two tramcars, but there was no space to pass between them.

The respondent contended (*a*) that a tramcar was a "carriage" within the meaning of the Motor Cars (Use and Construction) Order, 1904 (1); (*b*) that a tramcar temporarily at rest for the purpose of picking up and discharging passengers was still proceeding on its journey; (*c*) that the appellant had committed an offence by passing the tramcar proceeding in the same direction otherwise than on the right or off side of the same; and (*d*) that having regard to the facts the duty of the appellant was to stop until the road was clear on the right or off side of the tramcar, and to pass on that side only.

The appellant contended (*a*) that the tramcar was not a "carriage" within the meaning of the article; (*b*) that the tramcar being stationary at the moment could not be said to be proceeding in the same or any direction; and (*c*) that, if the tramcar was "proceeding," then at the time of passing the same the appellant was meeting the other tramcar, and that he could not pass the tramcar proceeding in the same direction on the right or off side of the same without committing an offence by keeping his motor car on the right or off side of the road when meeting the other tramcar, and that he was thus bound to offend against the order on whatever side he passed the two tramcars.

The magistrate was of opinion that the tramcar was a "carriage" within the meaning of the order, first, because it

(1) The Motor Cars (Use and Construction) Order, 1904, made by the Local Government Board under the Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), and the Motor Car Act, 1903 (3 Edw. 7, c. 36), art. 1: "In this order the expression 'carriage' includes a waggon, cart, or other vehicle. . . . ."

Art. 4: "Every person driving or in charge of a motor car when used on any highway shall comply with the regulations hereinafter set forth; namely . . . . (3.) He shall, when meeting any carriage, horse, or cattle, keep the motor car on the left or near side of the road, and, when passing any carriage, horse, or cattle proceeding in the same direction, keep the motor car on the right or off side of the same."

was a "vehicle," and, secondly, because the Tramways Act, 1870, throughout described tramcars as carriages (see ss. 25, 34, 40, 45, 46, 48, 50, 51, and 54; see also *Brian* v. *Aylward* (1), where a horse tramcar was held to be a stage carriage within 5 & 6 Vict. c. 79, s. 13); that the tramcar, although temporarily stopping at a stopping place to discharge and take up passengers, was so stopping in the course of its journey, and was "proceeding" within the meaning of the order; and that the appellant was not compelled to pass the tramcars at all while they were temporarily stopping alongside each other, discharging and taking up passengers, but might and ought to have waited until they had ceased discharging and taking up passengers and had gone on their journeys. He accordingly convicted the appellant and imposed a fine of 10*s*. and ordered him to pay 10*s*. for costs. (2)

The question for the opinion of the Court was whether upon the above facts the magistrate came to a correct determination in point of law.

G. F. Mortimer, for the appellant. The second contention raised on behalf of the appellant in the Court below, namely, that a tramcar which has stopped temporarily for the purpose of discharging and taking up passengers cannot be said to be "proceeding" in the same direction within the meaning of the article, is not now insisted upon. The only question which it is proposed to argue before this Court is whether a tramcar is a "carriage" within the meaning of art. 4 of the Motor Cars (Use and Construction) Order, 1904. If it had been intended to bring such an exceptional kind of vehicle as a tramcar within art. 4 express words would have been used. In the Tramways Act, 1870 (33 & 34 Vict. c. 78), wherever the word "carriage" is used to denote a tramcar it is nearly always used with words of qualification, such as carriages constructed for use upon railways, carriages with flange wheels, carriages using the tramway; and *Attorney-General* v. *Yorkshire (Woollen District) Electric Tramways, Ld.* (3) is not an authority against the appellant,

(1) (1902) 18 Times L. R. 371.

(2) It was stated by counsel that there was also a summons before the magistrate under s. 1 of the Motor Car Act, 1903, for driving in a manner dangerous to the public, and that this summons was dismissed.

(3) [1907] 2 K. B. 991.

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because the Act in question there defined a carriage as including a tramcar. The words "or other vehicle" in the definition of carriage in art. 1 of the order mean some vehicle ejusdem generis with a waggon or cart, namely, a vehicle capable of drawing in towards the kerb so as to allow an overtaking vehicle to pass it on the right or off side. Article 4 (3.) therefore only applies to carriages which are capable of lateral motion. The rule of the road as stated in art. 4 (3.) is the old customary rule of the road applicable to ordinary horse-drawn vehicles, though it is not necessarily applicable in all circumstances: *Wayte* v. *Carr*. (1) That rule of the road does not apply in the case of a vehicle passing a tramcar. Sect. 9 of the Tramways Act, 1870, requires tramways in towns, which are authorized by a provisional order, to be constructed as nearly as may be in the middle of the road; and vehicles overtaking and passing a tramcar ought to pass it on the left or near side: *Ramsay* v. *Thomson & Sons* (2); *Jardine* v. *Stonefield Laundry Co.* (3) The consequences of holding that a motor car must, under art. 4 (3.), pass an overtaken tramcar on the off side would be very serious. It would introduce a different rule of the road for motor cars from that applicable to horse-drawn vehicles, and it would be the cause of danger to and confusion in the traffic on the road, and in some places it would be impossible to comply with the requirements of the article. Looking at the serious consequences that would follow if the Court were to hold that the word "carriage" in art. 4 (3.) included a tramcar, and seeing that there is a reasonable construction which can be placed upon the word "carriage" and which will avoid those consequences, the Court ought not to hold that a tramcar comes within the article.

H. A. McCardie, for the respondent. The words of art. 1 are of the widest description. The word "carriage" is not limited in any way, but is to include a waggon, cart, or other vehicle. A tramcar is called a carriage throughout the Tramways Act, 1870. A bicycle is a carriage within s. 78 of the Highway Act, 1835: *Taylor* v. *Goodwin*. (4) In Stroud's Judicial Dictionary, 2nd ed. p. 261, it is said that "speaking

(1) (1823) 1 L. J. (K.B.) (O.S.) 63.
(2) (1881) 9 R. 140.
(3) (1887) 14 R. 839.
(4) (1879) 4 Q. B. D. 228.

generally a 'carriage' includes anything on which men or goods are carried." A tramcar is clearly a "carriage" in its ordinary sense, and there is nothing in arts. 1 or 4 of the order to cut down its meaning. If it had been intended to exclude a tramcar from the definition of carriage, definite words would have been used to carry out that intention. It is most important, for the protection of persons alighting from or entering tramcars, that there should be a general rule requiring a motor car to pass a tramcar on the off side, and not on the near side on which passengers enter and leave a tramcar. If in any special circumstances there is a difficulty or danger in obeying the rule, and the magistrates think that the breach of the article is of a trifling nature, they may, if they think fit, discharge the accused under s. 16 of the Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), without inflicting any punishment. That will meet any case of hardship. It might perhaps have been better if art. 4 had contained the qualification specified in s. 28 of the Town Police Clauses Act, 1847 (10 & 11 Vict. c. 89), which gives statutory sanction to the rule of the road, "except in cases of actual necessity, or some sufficient reason for deviation." Those qualifying words are not in art. 4 and the Court cannot read them in. The decision was therefore right.

G. F. Mortimer, in reply. The suggested danger, if it is a danger, to passengers entering or leaving tramcars, if motor cars are allowed to pass tramcars on the near side, is now present by reason of the rule that horse-drawn vehicles pass tramcars on the near side. It is better for the protection of the public to have one fixed rule that all traffic should pass on the same side.

LORD ALVERSTONE C.J. In this case the appellant was convicted of an offence against art. 4 of the Motor Cars (Use and Construction) Order, 1904, for having driven a motor car past a tramcar, which was proceeding in the same direction but which was at the moment stationary, on the left or near side of the tramcar instead of on the right or off side thereof. A point which appears to have been taken before the magistrate, namely, that the tramcar was not "proceeding in the same direction" within the meaning of art. 4 (3.) because it had at the moment

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been stopped for the purpose of discharging and taking up passengers, was very properly not raised here, as it seems to me to be quite clear that a tramcar is none the less "proceeding in the same direction" within the meaning of the article because it has temporarily stopped.

The case is, to my mind, one of some perplexity, not by reason of there being any difficulty in the actual point of law raised, namely, the construction of the article, but on account of the difficulty, I may perhaps almost say the impossibility, of placing a construction upon the article which will enable it to be obeyed in a reasonable manner in practice. I have myself no doubt that the intention was to apply to motor cars what I may call the customary rule of the road as applicable to ordinary horse-drawn vehicles, namely, when meeting to pass on the left or near side, and when overtaking to pass on the right or off side. The framers of this article, having that customary rule of the road in mind, seem to have overlooked the change which had been introduced by the advent of a class of traffic, such as tramcars, which run upon fixed rails. A regulation which requires an overtaking motor car to pass a tramcar on the off side of the latter cannot in many cases be complied with without giving rise to grave danger and difficulty For instance, in the case of a tramcar proceeding along the Thames Embankment from Westminster to Blackfriars it would be impossible for motor cars proceeding in the same direction to pass the tramcar on its right or off side without first crossing and then recrossing the whole of the traffic proceeding in the opposite direction. It is only necessary to mention that instance to shew the danger and difficulty that may possibly arise in complying with this regulation. Dealing with the case in its more general aspect, the fact that tramway lines are so frequently laid in the middle of the road has brought about a modification in the customary rule of the road and has made it reasonable in many cases for horse-drawn vehicles to pass an overtaken tramcar on the left or near side thereof. I have made the above observations because, in my opinion, if the construction contended for by the respondent is correct, the article will require to be amended as soon as possible. Whether the amendment

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should be on the lines indicated in s. 28 of the Town Police Clauses Act, 1847, or whether it should take some other form is for the Local Government Board to decide. It seems to me to be obvious that a rigid application of art. 4 (3.), as it now stands, in the case of a motor car overtaking and passing a tramcar will, as I have stated, in some circumstances lead to difficulty and danger, though it may properly be applicable in very many cases, as, for instance, where passengers are alighting from or entering a tramcar. I may observe in this connection that there is no charge here under s. 1 of the Motor Car Act, 1903, of driving in a manner dangerous to the public. We have been told that there was a summons against the appellant under that section and that it was dismissed. The question, therefore, before us is raised in the simple form, whether it is an offence under art. 4 (3.) of the Motor Cars (Use and Construction) Order, 1904, for a motor car when overtaking a tramcar to pass it on its left or near side. The answer to that question depends simply upon the true construction of that article, which provides that a person driving or in charge of a motor car on a highway shall, "when passing any carriage, horse, or cattle proceeding in the same direction, keep the motor car on the right or off side of the same." By art. 1 "carriage" is to include "a waggon, cart, or other vehicle." To my mind it is impossible to say that a tramcar is not a "carriage" or "vehicle" within the meaning of those articles. Not only are there decisions upon other Acts in which the word "carriage" has been given a wide meaning, but the well-known existence of tramcars at the time when the order was made renders it impossible for us to say that a tramcar is not a carriage within the meaning of art. 4 (3.). I cannot find any words in that article to shew that it was intended to limit its scope to carriages capable of lateral motion. If I could have seen my way to construe the article so as to limit its application to carriages capable of lateral motion, I should have been only too glad to do so, because the article, as it stands, imposes upon motor cars the hard and fast obligation of passing an overtaken tramcar on the right or off side. Though that is the result of our construction of art. 4 (3.), I can have no doubt that magistrates, if they think that a merely

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technical breach of the article has been committed, will in any such case exercise the very salutary powers conferred upon them by s. 16 of the Summary Jurisdiction Act, 1879. For these reasons I think that the magistrate was justified in convicting the appellant, and that therefore the appeal must be dismissed.

BIGHAM J. I am of the same opinion. I think it is impossible to say that the word "carriage" as used in art. 4 (3.) of the order does not include a tramcar. But from one's own knowledge of the manner in which tramways are laid in streets I feel convinced that in many cases it will be impossible, without great risk and danger, to comply with the requirements of that article. However, that is not a sufficient reason to authorize us to depart from the plain meaning of the words used and to say that a tramcar is not a "carriage" within the meaning of the article. I only desire to add that in my opinion the article urgently requires amendment.

WALTON J. I agree. The difficulty arises from the fact that in practice the customary rules of the road which apply to ordinary horse-drawn vehicles have been, almost of necessity, departed from in the case of tramcars. No doubt the intention of the framers of the order was to apply as between motor cars and other vehicles, including tramcars, the customary rules of the road, and therefore it might be said that, having regard to the fact that the customary rules of the road have been varied in the case of tramcars, art. 4 (3.) of this order ought not to be held to apply when a motor car is passing a tramcar. But in my opinion the language used in art. 4 (3.) is such as, unless we are to give it a strained construction, compels us to hold that the article applies in the case of tramcars.

Appeal dismissed.

Solicitors for appellant: *Steadman, Van Praagh & Gaylor, for Neumann & Holmes, Bradford.*

Solicitors for respondent: *Cann & Son, for F. Stevens, Bradford.*

W. F. B.

[IN THE COURT OF APPEAL.]

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Jan. 22.

COOPER *v.* KENDALL.

Limitations, Statute of—Simple Contract Debt—Acknowledgment—Unconditional Admission of Liability coupled with Expression of Hope to pay—Conditional or limited Promise.

To an action for recovery of a debt due on a bill of exchange the defendant pleaded the Statute of Limitations. Shortly before the commencement of the action and after the time fixed by the statute had run, the defendant wrote, in answer to a formal demand for payment by the plaintiff's solicitors, "I admit I owe your client the sum of 210*l.* 5*s.* but I cannot meet this liability at the moment although I hope to call upon you within fourteen days to make a definite proposal for repayment of that amount with interest from date of loan":—

Held, that this was a sufficient acknowledgment to prevent the operation of the statute.

Tanner v. *Smart*, (1827) 6 B. & C. 603, and *Smith* v. *Thorne*, (1852) 18 Q. B. 134; 21 L. J. (Q.B.) 199, distinguished.

Appeal from a decision of Darling J.

The action was brought to recover 280*l.* upon a bill of exchange for 200*l.* dated January 28, 1901, drawn by the plaintiff upon and accepted by the defendant at three months, and also upon an account alleged to have been stated between the parties on April 24, 1908. The defence was that the debt was barred by the Statute of Limitations. The plaintiff relied upon two letters written by the defendant on February 3, 1903, and April 24, 1908, as constituting an acknowledgment in writing of the debt sufficient to take the case out of the statute. The letter of February 3, 1903, was written to the plaintiff and was as follows:—

"Dear Mr. Cooper,—Your note of 30th ulto. received and I am sorry I cannot enclose cheque in reply to same. I trust, however, that it will not be very much longer before I can do so. I have been going through a hard time of it since I last saw you but begin to see 'daylight' and hope that this time I shall not be disappointed. I, indeed, regret the long delay that had occurred.

"With kind regards to you and yours

"Yours sincerely

"(Signed) Chas. B. Kendall."

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The debt not having been paid, the plaintiff's solicitors on April 22, 1908, wrote a formal letter to the defendant demanding immediate payment. The defendant replied on April 24 as follows :—

"Dear Sirs,—In reply to your letter of 22nd inst. I admit I owe your client Mr. Samuel Cooper the sum of 210*l.* 5*s.* but I cannot meet this liability at the moment although I hope to call upon you within fourteen days to make a definite proposal for repayment of that amount with interest from date of loan.

"Yours faithfully

"(Signed) Chas. B. Kendall."

On April 28 the writ in this action was issued.

The action was tried before Darling J. as a short cause under Order XIV., r. 8.

The learned judge considered himself bound by the principles laid down by the Court in *Chasemore* v. *Turner* (1) to hold that these letters did not constitute a sufficient acknowledgment to prevent the statute from running, and he gave judgment for the defendant.

The plaintiff appealed.

By consent the appeal was heard by two judges only.

Lush, K.C., and *F. Hinde*, for the plaintiff. An absolute admission or acknowledgment in writing that a debt is due is sufficient to prevent the operation of the statute because it imports a promise to pay; an admission coupled with a refusal to pay is not sufficient; whether an admission coupled with a conditional promise to pay is sufficient depends on the question whether the condition has been fulfilled. Upon the true construction of these letters there is here no conditional promise which controls the promise imported by the absolute admission that the debt is due. The learned judge's decision proceeded upon a misapprehension of the effect of *Chasemore* v. *Turner* (1), which really supports the plaintiff's case.

[They were stopped.]

Whately, for the defendant. When the letters relied on as an

(1) (1875) L. R. 10 Q. B. 500.

acknowledgment in writing contain anything beyond an unconditional admission of the debt it is necessary to examine their language to see what the promise is. Here the debtor says he cannot pay, but expresses a hope that he may be able to do so at some future time. That is not a promise to pay at all. The defendant's case is not that the promise was conditional and that the condition was not fulfilled, but that upon the construction of the letters there was nothing amounting to a promise at all. An admission of the debt coupled with a statement that the debtor cannot pay is not sufficient; and the mere expression of a hope that he will be able to pay shortly cannot be construed into a promise: *Tanner* v. *Smart* (1); *Smith* v. *Thorne*. (2)

[COZENS-HARDY M.R. referred to *Sidwell* v. *Mason*. (3)]

That is distinguishable because there was there no statement that the debtor could not pay. In *Chasemore* v. *Turner* (4) it was assumed that an admission of the debt coupled with a statement that the debtor was unable to pay at the time would not be a sufficient acknowledgment.

COZENS-HARDY M.R. In this case I am unable to assent to the view taken by Darling J. as to the effect and construction of two letters signed by the defendant which the plaintiff alleges take the case out of the Statute of Limitations. The law does not appear to me to be open to much question. I take first what was said by Channell B. in *Lee* v. *Wilmot* (5): "If there be a distinct acknowledgment it is not necessary that it should contain a promise in explicit terms, but from the acknowledgment a promise may be inferred, unless it be accompanied by a refusal to pay, or by any other circumstance which excludes that inference." That is almost the language which was used by Cleasby B. in *Chasemore* v. *Turner* (6): "Undoubtedly in this case there is an unconditional acknowledgment of the debt; what we are to consider is, whether there is coupled with that unconditional acknowledgment of the debt a conditional or

(1) 6 B. & C. 603.
(2) 18 Q. B. 134; 21 L. J. (Q.B.) 199.
(3) (1857) 2 H. & N. 306.
(4) L. R. 10 Q. B. 500.
(5) (1866) L. R. 1 Ex. 364, 367.
(6) L. R. 10 Q. B. 500, 517.

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limited promise, so as to negative the implication of an unconditional promise to pay which would in general arise from an unconditional acknowledgment of the debt."

I may also refer to what Bramwell B. said in *Sidwell* v. *Mason* (1): "It is a mistake to suppose that because a man expresses a hope to pay when he acknowledges the debt, that therefore the acknowledgment is to be taken as the mere expression of a hope to pay. If a man says 'the bill is due, I hope to be able to pay next month,' that is an acknowledgment; the hope expressed is not inconsistent with a promise to pay immediately."

Applying these passages, which I think are perfectly consistent with all the authorities cited, what are the facts? Two letters are relied upon by the plaintiff. The first is the letter of February 3, 1903, which is written by the defendant to the plaintiff. It is quite true it does not in terms apply to this debt, but Mr. Whately, with his usual fairness, admitted that it did so apply. So that the first sentence reads "I am sorry I cannot enclose cheque in payment of this debt." That is all. It does not say "I am unable to pay the debt," though I do not think that that would be really sufficient. Then the letter goes on, "I trust, however, that it will not be very much longer before I can do so. I have been going through a hard time of it since I last saw you but begin to see 'daylight' and hope that this time I shall not be disappointed. I, indeed, regret the long delay that had occurred."

That was followed in April, 1908, by a formal demand for payment by the solicitors of the plaintiff, and this is the defendant's reply: "In reply to your letter of 22nd inst. I admit I owe your client Mr. Samuel Cooper the sum of 210*l.* 5*s.*"—it is impossible to have a more clear and absolute acknowledgment than that—"but I cannot meet this liability at the moment although I hope to call upon you within fourteen days to make a definite proposal for repayment of that amount with interest from the date of the loan." I ask myself, Is there in these letters or in either of them anything sufficient to rebut or negative the implied promise to pay which arises from the unconditional acknowledgment?

(1) 2 H. & N. 306, 310.

With great respect to the learned judge I think not. Upon the construction of these letters it appears to me that there is an unconditional acknowledgment by the debtor, coupled, however, with the expression of a hope that the creditor will give him time to pay. That in my opinion is not sufficient to rebut the promise to pay implied in the unconditional acknowledgment. I think that this appeal must be allowed and that judgment must be given for the plaintiff for 280*l.* with costs here and below.

BUCKLEY L.J. I have to look at that which the defendant has signed to see whether there exists in writing either (*a*) an acknowledgment from which the law infers a promise or (*b*) a promise to pay. In either case the effect is not to revive the old debt, but to create a new cause of action. Is there anything signed by him which contains either expressly or by implication a new promise to pay? The latter of the two letters, I think, is the more important. [The Lord Justice read the letter of April 24.] That letter contains an express admission of the debtor's liability. If there were nothing more there would flow from that as matter of law an implied promise to pay. But I must look further to see whether the letter contains anything which negatives the existence of that implied promise to pay or makes it either a conditional or a limited promise to pay. The respondent's counsel has declined to argue that the letter was a conditional promise, and I think he was wise in so doing, but he says it was a limited promise. I think it is not.

The cases principally relied on in support of the contention were *Tanner* v. *Smart* (1) and *Smith* v. *Thorne*. (2) I wish to point out wherein to my mind lies the distinction between those cases and the present. In *Tanner* v. *Smart* (1) there was no express admission of the debt. The words are "I cannot pay the debt at present but I will pay it as soon as I can." That was an undertaking by the debtor to pay as soon as he could; it was a limited or conditional promise, I care not which you call it. There was no present promise to pay, either express or implied. It was a refusal to pay at present coupled with a hope or expectation of paying at a future time. That has nothing to do with this case.

(1) 6 B. & C. 603. (2) 18 Q. B. 134; 21 L. J. (Q.B.) 199.

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In *Smith* v. *Thorne* (1) again there was no distinct acknowledgment of the debt. That is clearly pointed out by Parke B. in delivering the judgment of the Court. Further than that, the promise made in that case was conditional upon the debtor being able to transfer a particular mortgage and thus put himself in funds. It was as if the debtor had said "I hope to be able to sell my house and if I succeed in doing so I will pay you." Neither of those cases, I think, has anything to do with the present. *Chasemore* v. *Turner* (2) is, of course, the principal case on this branch of the law, and taking the passage which the Master of the Rolls has already read from the judgment of Cleasby B. as supplying the test of the sufficiency of the acknowledgment, I have to see whether in this letter of April 24 there is coupled with the unconditional acknowledgment of the debt a conditional or limited promise. I think not. In the first sentence there is an unconditional acknowledgment from which in the absence of more there arises an implied promise to pay. As to what follows I think that the observations of Bramwell B. in *Sidwell* v. *Mason* (3) are strictly appropriate; the hope expressed is not inconsistent with a promise to pay immediately. It is said that because the debtor says "I cannot meet this liability at the moment" there is a refusal to pay. I do not so construe the letter. It appears to me to be a request for time. It is a statement, not that the debtor cannot or will not pay, but that his affairs are in such a condition that he cannot immediately pay and therefore he asks for time. I think that this letter is a sufficient acknowledgment to prevent the statute from running.

Appeal allowed.

Solicitors: *Tredgold & Narlian; Chas. R. Enever.*

(1) 18 Q. B. 134; 21 L. J. (Q.B.) 199. (2) L. R. 10 Q. B. 500.
(3) 2 H. & N. 306, 310.

H. B. H.

[COURT OF CRIMINAL APPEAL.]

1909
Jan. 15.

THE KING *v.* CROSSLEY.

Criminal Law—Perjury—Judicial Proceeding—Arbitration under Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58).

An arbitration before a county court judge to settle a question of compensation under the Workmen's Compensation Act, 1906, is a judicial proceeding, and therefore an indictment for perjury will lie in respect of false evidence given on oath in a material particular in the course of the arbitration.

APPEAL to the Court of Criminal Appeal against a conviction.

The appellant was indicted before Channell J. at the Liverpool Assizes for having committed wilful and corrupt perjury in evidence given by him on oath in a material particular during the hearing before a county court judge of an application by the appellant for an award of compensation under the Workmen's Compensation Act, 1906.

Before the appellant pleaded to the indictment objection was taken on his behalf that the proceedings before the county court judge under the Workmen's Compensation Act, 1906, were not judicial proceedings, and that therefore an indictment for perjury would not lie. Channell J. held that the proceedings before the county court judge were judicial proceedings and that the indictment would lie.

The appellant was then called upon to plead to the indictment and pleaded guilty.

T. E. Rushton, for the appellant. The proceedings for the assessment of compensation under the Workmen's Compensation Act, 1906, before a county court judge are not judicial proceedings, and an indictment for perjury will not lie in respect of false evidence given on oath in the course of those proceedings. By s. 1, sub-s. 3, of the Act, if any question arises in any proceedings under the Act as to the liability to pay compensation or as to the amount or duration of compensation, the question, if not settled by agreement, shall be settled by "arbitration" in accordance with the Second Schedule to the Act. By Sched. II., clause 2,

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where the parties have not agreed upon an arbitrator, the matter is to be settled by the county court judge according to the procedure prescribed by rules of Court, or under clause 3 the matter may, if the Lord Chancellor so authorizes, be settled by a single arbitrator appointed by the county court judge. Rule 2 (1.) of the Workmen's Compensation Rules, 1907, also speaks of the proceedings as an arbitration. Rule 27 (1.) provides that, subject to the special provisions of those rules, the procedure in such an arbitration shall be the same as in an action commenced in the county court in the ordinary way; and the statutory provisions and rules for the time being in force relating to such actions shall, with the necessary modifications, apply to such arbitration. That rule merely regulates the procedure and does not make the arbitration a county court action to which the County Courts Acts apply. Therefore the proceedings are by way of arbitration, and the county court judge acts as an arbitrator. Clause 4 of Sched. II. to the Act excludes the application of the Arbitration Act, 1889 (52 & 53 Vict. c. 49), s. 22 of which makes the giving of false evidence in an arbitration perjury. An arbitrator has power under s. 16 of the Evidence Act, 1851 (14 & 15 Vict. c. 99), to administer an oath, but it required an express enactment to make the giving of false evidence in an arbitration perjury. There is no provision in the Workmen's Compensation Act, 1906, making it perjury to give false evidence in an arbitration under that Act. Statutes have frequently been passed to make false evidence on oath before special tribunals perjury: see 1 Russell on Crimes, 6th ed. pp. 297, 298. "The legal offence of perjury can only be committed in certain cases of oaths taken under the common law, or in oaths taken under particular statutes in which the offence is provided for. It by no means necessarily follows that perjury must be committed in a false oath taken under a particular statute. Though a high misdemeanour, it would not be perjury unless so made by the statute requiring the oath; and there are many cases of statutes requiring oaths, and not creating the offence": per Lord Tenterden C.J. in *Rex v. Mudie* (1); Archbold's Criminal Pleading, 23rd ed. p. 1043.

(1) (1831) 1 Moo. & R. 128, at p. 131.

These proceedings not being judicial proceedings, an indictment for perjury will not lie. [The Oaths Act, 1838 (1 & 2 Vict. c. 105), was also referred to.]

Gilbert Jordan, for the prosecution. The proceedings before a county court judge under the Workmen's Compensation Act, 1906, are judicial proceedings. The Act is entitled an Act to consolidate and amend the law with respect to compensation to workmen for injuries suffered in the course of their employment, and the Act proceeds by s. 1, sub-s. 3, to enact how the rights and liabilities of employers and workmen are to be determined, namely, by arbitration in accordance with Sched. II. to the Act. No doubt the word "arbitration" is used in that section as well as in Sched. II., but clause 4 of Sched. II. makes it clear that the proceedings are not an arbitration in the ordinary sense; and clause 12 provides that the duty of a judge of county courts under the Act or of an arbitrator appointed by him shall, subject to rules of Court, be part of the duties of the county court. The county court judge is nowhere in Sched. II. called an arbitrator. By r. 27 (1.) of the Workmen's Compensation Rules, 1907, the procedure is, subject to the special provisions of the rules, to be the same as the procedure in an action commenced in the county court in the ordinary way, the applicant being deemed to be the plaintiff and the respondents the defendants; and r. 81 provides that the proceedings before the judge or an arbitrator appointed by him shall be recorded in the books of the Court. Those provisions shew that the proceedings are for the purpose of legally ascertaining rights and liabilities, and are therefore judicial proceedings within the definition of that expression in Stephen's Digest of the Criminal Law, 1st ed. p. 82, 5th ed. p. 107. [He also referred to *Reg.* v. *Tomlinson*. (1)]

Rushton, in reply.

The judgment of the COURT (Lord Alverstone C.J., Bigham and Walton JJ.) was delivered by

LORD ALVERSTONE C.J. In our opinion the view taken by Channell J. at the trial, without having had the advantage of

(1) (1866) L. R. 1 C. C. 49.

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hearing as full an argument as we have heard, is correct, namely, that proceedings before a county court judge under the Workmen's Compensation Act, 1906, are judicial proceedings. It is, no doubt, true, as has been pointed out, that there are expressions in the Act and in Sched. II. which speak of the proceedings as an arbitration, and it is also true that by clause 4 of Sched. II. it is expressly provided that the Arbitration Act, 1889, is not to apply to any arbitration under the Act of 1906, so that the Crown cannot rely upon s. 22 of the Act of 1889, which makes a person who wilfully and corruptly gives false evidence before an arbitrator guilty of perjury. We must therefore examine the Act and rules for the purpose of ascertaining what is the nature of the proceedings before the county court judge under the Act of 1906.

By s. 1, sub-s. 3, of the Act, "if any question arises in any proceedings under this Act as to the liability to pay compensation under this Act (including any question as to whether the person injured is a workman to whom this Act applies) or as to the amount or duration of compensation under this Act, the question, if not settled by agreement, shall, subject to the provisions of the First Schedule to this Act, be settled by arbitration in accordance with the Second Schedule to this Act."

It is not necessary to refer to the First Schedule, which deals with the scale and conditions of compensation, and which is therefore irrelevant to the question before us. We have to consider what is the meaning of the words "the question, if not settled by agreement, shall be settled by arbitration in accordance with the Second Schedule to this Act." The use of the word "arbitration" does not necessarily imply that the person who is to settle the question occupies the position of an arbitrator and nothing more, and that is brought into clear relief by the provisions of Sched. II. That schedule is headed "Arbitration, &c.," and clause 1 provides that "for the purpose of settling any matter which under this Act is to be settled by arbitration, if any committee, representative of an employer and his workmen, exists with power to settle matters under this Act in the case of the employer and workmen, the matter shall, unless either party objects by notice in writing sent to the other party before the committee meet to consider the matter, be settled by the

arbitration of such committee, or be referred by them in their discretion to arbitration as hereinafter provided." By clause 2, "if either party so objects, or there is no such committee, or the committee so refers the matter or fails to settle the matter within six months from the date of the claim, the matter shall be settled by a single arbitrator agreed on by the parties, or in the absence of agreement by the judge of the county court, according to the procedure prescribed by rules of Court"; and by clause 3, "In England the matter, instead of being settled by the judge of the county court, may, if the Lord Chancellor so authorizes, be settled, according to the like procedure, by a single arbitrator appointed by that judge, and the arbitrator so appointed shall, for the purposes of this Act, have all the powers of that judge." The county court judge, therefore, is a statutory judge appointed by the Act in certain events to settle the question of compensation; he is not an arbitrator chosen by the parties, but is appointed by the Act where the parties have not agreed upon an arbitrator. The procedure which regulates the settlement of the question is prescribed by the Workmen's Compensation Rules, 1907. Rule 2 (1.) says that when application is made for the settlement by the judge or by an arbitrator appointed by the judge of any matter which under the Act is to be settled by arbitration, the party making such application shall be called "the applicant" and the other parties "the respondents." By r. 27 (1.), "Subject to the special provisions of these rules, the procedure in an arbitration shall be the same as the procedure in an action commenced in the county court by plaint and summons in the ordinary way, and determined by the judge without a jury; and the statutory provisions and rules for the time being in force relating to such actions shall, with the necessary modifications, apply to such arbitration accordingly; and in the application of such provisions and rules the applicant's request for arbitration shall be deemed to be a summons with particulars annexed, the day fixed for proceeding with the arbitration shall be deemed to be the return day, and the applicant and respondents shall be deemed to be plaintiff and defendants respectively." There are other provisions in the rules which I need not specifically refer to, but they all emphasize

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this, that the county court judge, when he is called upon to act, is the judge appointed by the Act to settle the matter between the parties and to determine their rights and liabilities, having, subject to the provisions of the rules, the ordinary powers of a county court judge. It is said that because the proceedings are called in the Act and in the rules an arbitration, and because the judge has to act according to the procedure laid down by the rules, the judge is to be regarded as an arbitrator and the proceedings as an arbitration in the ordinary sense; and that, inasmuch as clause 4 of Sched. II. to the Act excludes the application of the Arbitration Act, 1889, and as there is no provision in the Workmen's Compensation Act, 1906, similar to that contained in s. 22 of the Act of 1889, no indictment for perjury will lie for false evidence given on oath in the course of proceedings under the Act of 1906. We cannot assent to that argument. The fundamental ground of our decision is that the proceedings under the Act of 1906 are judicial proceedings, and that therefore the appellant has been guilty of the offence of perjury at common law. It may well be that the Legislature thought it desirable to insert in the Arbitration Act, 1889, which deals largely with references by consent, an express provision that a person who wilfully gives false evidence before an arbitrator shall be guilty of perjury. But that fact can have no relevance when we are dealing with proceedings under the Workmen's Compensation Act, 1906, before a county court judge, who is appointed by the Act, where the parties have not agreed upon an arbitrator, to settle questions arising thereunder in a judicial manner. For these reasons we are of opinion that the proceedings are judicial proceedings and that the indictment for perjury is maintainable. If that were not so, and if no indictment for perjury lay in a case like this, the consequences might be extremely serious. The appeal must therefore be dismissed.

Appeal dismissed.

Solicitor for appellant: *Registrar of the Court of Criminal Appeal.*

Solicitor for prosecution: *Director of Public Prosecutions.*

W. F. B.

[IN THE COURT OF APPEAL.]

C. A.
1908
Dec. 9, 17.

MOORE *v.* MANCHESTER LINERS, LIMITED.

Employer and Workman—Compensation—Accident arising out of and in Course of Employment—Ship—Ladder—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A fireman went ashore to procure necessaries not provided by the owners of the ship on which he was employed. On returning to the ship he fell off a ladder which was the only means of access to the ship and was drowned:—

Held by Cozens-Hardy M.R. and Farwell L.J. (Fletcher Moulton L.J. dissenting), that he went ashore for his own purposes and not on the ship's business, and that, inasmuch as he had not actually got back on board the vessel, the accident did not arise "out of and in the course of the employment" within the meaning of the Workmen's Compensation Act, 1906.

McDonald v. *Owners of Steamship Banana*, [1908] 2 K. B. 926, followed.

APPEAL against an award of the judge of the county court of Manchester.

This was an appeal by Manchester Liners, Limited, the owners of the steamship *Manchester Exchange*, from a decision of the judge whereby he awarded 240*l.* to the applicant, who was the widow of James Moore, a fireman on board the *Manchester Exchange*. The ship arrived at the port of South Brooklyn on May 6, 1908. James Moore and others of the crew went on shore at about 6.30 in the evening of May 7, and, whilst returning to the ship at about 12.50 in the morning of May 8, he fell into the dock and was drowned.

It appeared from the evidence that the firemen were only provided with food in addition to their wages, and that everything required by them in the nature of soap, clothing, matches, tobacco, and other necessaries had to be purchased out of their own funds. It was customary when the ship arrived in port for the master or steward to make arrangements with a keeper of stores to supply the various articles required by the men up to a certain value, the goods to be delivered on board and paid for by the captain. An arrangement was accordingly made that the

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crew should get what they wanted at the stores of one Isaac Sabbath, and on the evening of May 7 Moore and four other men went to these stores, where Moore bought soap and trousers.

By American law it was necessary that all foreign sailors who went ashore should be provided with passes signed by their officers, and there was a conflict of evidence whether on this occasion any of the five men had passes, though they knew they were necessary. They went openly, and were seen both when they left and when they returned to the ship, and there was no entry in the log as to their being absent without leave, nor were any of them reprimanded.

After leaving the stores the men went to a beer-house and stayed there until midnight. They then returned to the ship, and in order to get on board had to climb up a ladder on to the deck of the ship. This was an ordinary open ladder and was attached at the top to the ship in such a way as to allow play for the rise and fall of the ship on the tide. The lower end rested on the quay. Moore fell off this ladder and was drowned, and his widow claimed compensation.

The learned county court judge found that the men had been drinking, but were capable of walking back to the ship, and had not been guilty of misconduct; that the ladder was unsafe; that Moore was doing his duty at the time of the accident, and that the accident arose out of and in the course of his employment; and he awarded 240*l.* compensation.

The employers appealed.

Atkin, K.C., and *R. M. Montgomery*, for the appellants. The county court judge was not justified in holding that the accident arose "out of and in the course of the employment." Moore went on shore without a pass and without leave, but, whether that be so or not, it is clear that he went for his own purposes, and not for any purpose connected with the employment. If the accident had happened after he had returned on board the ship it might have been within the Act, but he fell off the ladder before he reached the ship. This case is undistinguishable from *McDonald* v. *Owners of Steamship Banana* (1) except

(1) [1908] 2 K. B. 926.

that in that case the man fell off a gangway instead of off a ladder. The Court there held that the accident did not arise out of and in the course of the deceased's employment. *Robertson* v. *Allan Brothers & Co.* (1) does not apply to this case, for there the seaman had actually returned to the ship and fell into the hold from the deck; and it was admitted that the only ground on which the employers could escape from liability was the disobedience of the workman.

C. A. Russell, K.C., and *C. P. Gibbons*, for the applicant. No doubt if Moore had no right to be away we cannot contend that it was his duty to return to the ship, but the evidence shews that the men went ashore with the knowledge and leave of their officers, and did so in the course of their employment. An employer who does not undertake to supply his men with necessaries makes it part of their duty to get these things for themselves. Therefore it was part of Moore's duty to return on board ship; and it is settled that a workman who is going to his work no longer proceeds at his own risk when he has reached the means of access to the workshop provided by the employer: *Sharp* v. *Johnson & Co., Ld.* (2) The ladder was tied to and formed part of the ship; so Moore was actually on his employers' premises when the accident occurred, and *McDonald* v. *Owners of Steamship Banana* (3) has no application. The employers had themselves provided the ladder as the means of access to the ship.

Atkin, K.C., in reply.

Cur. adv. vult.

Dec. 17. The following written judgments were delivered.

COZENS-HARDY M.R. This is a case in which a fireman met with an accident at New York under circumstances which the learned county court judge has held to justify a finding that it arose out of and in the course of his employment. The fireman was employed on a vessel called the *Manchester Exchange*. At New York there is a local statute rendering foreign sailors liable to arrest and imprisonment if found in the

(1) (1908) 98 L. T. 821. (2) [1905] 2 K. B. 139, 145.
(3) [1908] 2 K. B. 926.

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streets without a pass from the vessel in which they are serving. It is proved that the firemen were informed of this, and instructed that they must not go ashore without a pass. The learned county court judge's finding is in these words: "I am not satisfied that they had passes which are required by the law of America." The deceased man, with four other firemen, went ashore on the evening of May 7 to, amongst other things, buy soap and clothes, which they needed for their own purposes. There was a store in New York to which it was notified that they might go, and at which they might obtain credit to a certain amount. They went to this store, made some purchases, and went to a drinking saloon, though it is not proved that they were drunk. They arrived at the quay-side some time after midnight, and the deceased, in going up a ladder from the quay-side to the vessel, fell into the water and was drowned.

I think it is impossible to hold that the deceased went on the ship's business. He went for his own purposes, and it is irrelevant to say that he could not do his duty without purchasing clothes, &c. The learned county court judge finds as a fact "that their superiors knew that they were going ashore." I am unable to discover any evidence justifying this finding, but nevertheless I accept it for the purpose of this appeal; for in my view it is immaterial for the present case to consider whether the deceased went ashore in breach of orders or by permission. In either case it seems to me that he was outside the protection given by the Act from the moment he left the ship until he got back on to the ship. This was the view taken by this Court in *McDonald* v. *Owners of Steamship Banana* (1), which is binding upon us. I am entirely unable to distinguish the ladder from the gangway in that case. Nor do I see any inconsistency between that case and the case of *Robertson* v. *Allan Brothers & Co.* (2) If a sailor has been out for his own amusement, whether with or without consent, his right to protection under the Act is complete when once he has got back on board the vessel. In *Robertson* v. *Allan Brothers & Co.* (2) the man fell through an open hatchway into the hold after he had got on board the vessel. In *McDonald* v. *Owners of Steamship Banana* (1) the accident

(1) [1908] 2 K. B. 926. (2) 98 L. T. 821.

happened before he had got on board, and, although he was very close to the vessel and on his way back, the result must be the same as if the accident had happened while he was on the road returning to the ship or on the quay itself. In my view the learned judge has misdirected himself, and the appeal ought to be allowed on the ground that the accident did not arise out of and in the course of his employment.

FLETCHER MOULTON L.J. The facts relating to the accident by which the husband of the applicant lost his life are very simple. He was a fireman on board the *Manchester Exchange*, a steamer belonging to the respondents. She arrived at Brooklyn on the evening of May 6, and it was whilst she was lying alongside the wharf that the accident happened. The vessel's deck was considerably higher than the wharf, and access was obtained by a ladder fastened to the ship in such a way that the rise and fall of the tide (which is small in Brooklyn Harbour) did not interfere with its function of being the mode of access to the ship. The deceased was returning to the ship a little after midnight on May 7 to sleep there, as was his duty. In the ordinary course his work would commence on the following morning at 7 o'clock. As he was mounting the ladder he fell between the ship and the wharf and was drowned. By the notice of appeal one point only is raised, namely, that the accident did not arise out of or in the course of his employment. This is put in two ways, namely, that the county court judge was wrong in law in holding that it was so caused, and that there was no evidence that it was so caused. But to my mind nothing turns upon the distinction between these two modes of presentation of the defence which is raised, namely, that the death was not caused by an accident arising out of and in the course of his employment.

The learned judge states that there is a great conflict of evidence in the case, and this is clear from a perusal either of his notes of the evidence or of the shorthand notes which have been somewhat freely referred to before us. But on all material points the learned judge gives us clear findings of fact, which are, of course, binding upon us. He finds that "the deceased met

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his death by falling from a ladder into the dock, where he was drowned. He was returning to the ship to his duties after an absence on lawful and ordinary business. The ladder was not fixed, and it swayed about. It was an unsafe contrivance, and particularly so at night to a man who had been drinking." Although he here refers to the undoubted fact that the deceased had been drinking, it will be observed that he does not find that the deceased was drunk, and there is, in my opinion, no evidence on which he could properly have so found. The exact terms of his finding in this respect are as follows: "I find as a fact the deceased and the others were drinking whilst on shore, but they seemed to have been capable of walking back to the vessel, and I do not find that the deceased was guilty of any serious and wilful misconduct."

I confess that to my mind these findings appear conclusive to establish that the accident arose out of and in the course of the employment of the deceased. In countless cases the Court of Appeal has had to deal with accidents happening to workmen going to their employment or coming away from it, and where the accident has arisen through the workmen using special modes of access provided by their employers to enable them to go to or come from the actual place of employment the Court has, so far as I know, never hesitated in holding that the accident arose out of and in the course of their employment. The case of a seaman engaged, as here, for the round trip is a much stronger one. His employment is continuous and there is no moment when he, whether on board or on shore, is not bound to obey the captain's orders. But even if we put aside this very important and characteristic peculiarity of a seaman's employment the finding that the deceased was returning to the ship to his duties after an absence on lawful and ordinary business puts him, to my mind, in the same position as a workman employed on board the vessel going to his duties there by the appointed mode of access. In the present case this was a ladder attached to the vessel and forming part of it for the purpose of access just as much as if it had been a rope ladder hanging from the bulwark or steps fixed to the side of the ship, and the employer is, to my mind, clearly responsible in respect of an accident

arising to a seaman using that mode of access for the purpose of returning to his duties on board the vessel.

The argument on behalf of the owners is that the absence from the vessel had not been for the purposes of the ship. The facts relating to this are as follows. There are various necessaries which are not supplied to firemen by the owners of the ship, the only two to which in this case one need refer being soap and clothes. It is, of course, necessary that the firemen should procure these articles from time to time, and therefore, to avoid the necessity of making advances to them in money, it is the established custom at each port for the steward acting on behalf of the owner to fix upon some general dealer at that port at whose shop the sailors and firemen may purchase necessaries to a limited extent, the amount of their purchases being paid direct by the captain to the dealer before the ship leaves the port, and debited against the men's earnings. In the present case the general dealer selected by the steward and notified to the men was a man of the name of Sabbath, and it was to his shop that the deceased, with four others, had gone on the night in question for the purpose of purchasing such necessaries. There was a conflict of evidence as to whether they had obtained leave to go on shore for that purpose, but as I read the finding of the learned judge he finds this fact in favour of the applicant. He specifically finds as follows: "I find as a fact that their superiors knew they were going on shore and that the steward told them the shop they were to deal at and the credit they could obtain at the shop. There is no entry in the log that any one was reprimanded or punished for breach of duty in relation to the visit, but if much of the respondents' evidence is to be believed it is inconceivable that the captain would not have taken notice of what it is now contended was a serious offence. The visit on shore was for the purpose of obtaining ordinary necessaries of life, namely, soap and trousers." Coupling this with the fact that the learned judge specifically states that he does not find that the deceased was guilty of any serious or wilful misconduct, I can only come to the conclusion that he intends this to be a finding to the effect that the visit on shore was with the knowledge and consent of his superiors, and

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that therefore the deceased was lawfully absent from the ship during the time that he was on shore.

The counsel for the respondents based most of their arguments on a matter which to my mind is not of the essence of the case. It appears that by American law sailors not of American nationality belonging to ships in harbour are liable to be arrested if on shore unprovided with written permits from the chief engineer or the captain of their ship. Two of the men who went on shore with the deceased on the occasion were called as witnesses for the applicant and swore that all of them had such permits, which were obtained from the second engineer. The second engineer denied that they applied to him for such permits or that he gave them, and supported his evidence by producing a book containing counterfoils of permits given. No counterfoils for permits given on the date in question appear in that book. The men adhered to their story, and it is clear that there were two other books in use on board of the vessel besides the one which was produced at the hearing, so that the absence of the counterfoils of that date was not conclusive against the truth of their statement. The second engineer swore, however, that the book he produced was the only one used for his department. In this conflict of evidence the judge finds as follows: "I am not satisfied that they had passes which were required by the law of America, but if they had not it was because their superiors omitted to give them passes. I find as a fact that their superiors knew that they were going on shore." If the question of their having passes was an issue in the case, it might be necessary to consider on whom the onus of proving it would lie. But it is not an issue in the case. Its relevance is only as evidence tending to support the rival contentions as to whether the men were on shore with or without leave. On the one hand, if the passes were in fact given, it would be practically conclusive evidence that leave had been given. But the converse is not the case, for it was open to the officers of the ship to permit the men to go on shore without giving them passes, because the necessity for passes arises merely from American law and has no effect on the contract of service between the sailors and their employers. If it had been shewn that no passes were in fact

given, it would be evidence in favour of the contention that the sailors were in fact absent without leave, but it would be nothing more. In my opinion the finding of the judge shews clearly that in his view neither the positive nor the negative of the assertion that written passes had been given was adequately established by evidence, and therefore the case of neither party has the support it would have had from the one or the other being established. He is therefore reduced to deciding the question whether the men were absent without leave and in breach of their duty by the rest of the evidence in the case, and to my mind his findings leave no doubt that in his view there was nothing improper in their going on shore. It was in their own free time and with the knowledge and assent of their superiors.

Having dealt with the evidence in the case, I now come to the authorities. Each party claims that this Court is bound by one of its own previous decisions to decide in its favour. The applicant relies on the case of *Robertson* v. *Allan Brothers & Co.* (1), the facts of which closely resemble those in the present case, and in fact appear to me to make the decision an authority in favour of the contention of the applicant under circumstances less favourable than those we have here. In that case a steward employed aboard a ship went ashore while the ship was discharging cargo in port during hours that he was at liberty so to do. Being to some extent under the influence of drink, he returned on board the ship by means of the cargo skid, in order to escape the observation of the officers of the ship, instead of by the ordinary gangway—a course which was apparently contrary to orders. He slipped on the deck in stepping from the gangway and fell down an unguarded hatch into the hold, sustaining injuries which resulted in his death. The Court seems to have had no difficulty whatever in holding that the employers were liable in that state of things, excepting so far as his use of the cargo skid (which was not a proper access to the ship) was concerned. And they further held that his doing so was not sufficient to prevent the accident arising out of and in the course of the employment, and they supported the judgment of the county court judge, in which occurs this very relevant passage: "In this case the deceased's

(1) 98 L. T. 821.

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sleeping quarters were provided on the ship. He had a right to return to the ship when so minded, and it was his duty to return to the ship at all events before 6 A.M. The actual return to the ship after leave to go ashore was a natural and normal incident arising out of the employment. There was an implied command to do this some time before 6 A.M.," the hour at which his work recommenced, "and an implied invitation to do it at any time before that time. The deceased was returning in pursuance of his obligation which arose out of his employment. He was returning with the object of sleeping on board and being ready and fit for his work at 6 o'clock next morning"; and the judgment of this Court appears to me to approve entirely of the ratio decidendi of the learned judge thus expressed, and it is in my opinion sound in law. Every word of this applies with at least equal strength to the present case. The ladder was, for the purpose of the employment, the proper and provided access to the ship, and falling from it appears to me to be in every respect identical from a legal point of view with falling from the end of the cargo skid in the case quoted. I am therefore of opinion that the counsel for the applicant were right in claiming that this case is conclusive in her favour.

The case on which counsel for the respondents relied is *McDonald* v. *Owners of Steamship Banana.* (1) In that case a sailor who had gone on shore while the ship was lying at the port of Bremerhaven, on returning to the ship, fell off the gangway leading from the quay to the ship and was killed. It is to be observed that in that case the only evidence on behalf of the applicant was an entry in the ship's official log which was as follows: "Thomas McDonald, donkeyman, whilst returning on board ship from the shore more or less the worse for liquor refused the aid of night watchman and policeman to assist him up the gangway and on reaching the top step suddenly overbalanced and fell over the gangway man-ropes dropping between the ship and quay and striking the iron girder before reaching the water." The Court upon this evidence held that the applicant had failed to prove that the accident arose out of and in the course of the deceased's employment, and did so expressly on the

(1) [1908] 2 K. B. 926.

ground that nothing more had been proved than that the man fell on his way back to the ship and that that was not sufficient to discharge the onus which lay upon the applicant to prove that the accident arose out of and in the course of his employment. As a decision this does not appear to me to be necessarily in conflict with the case of *Robertson* v. *Allan Brothers & Co.* (1) or to be sufficient to support the contention of the respondents in the present case. The onus lies upon the applicant, who must prove all necessary facts, and here the facts proved are so meagre that it is doubtful whether they exclude the possibility that the man was using the gangway improperly, say, for example, for "larking," and certainly, as is pointed out by the Court, they do not exclude the case of his having gone on shore in direct defiance of orders. The report does not describe the nature or position of the gangway, but, from the accident being treated in the leading judgment as analogous to a domestic servant being knocked down by a motor omnibus in the public streets while going out for his own amusement, I should conclude that the learned judges who decided the case did not regard the gangway as a special and provided mode of access to the ship, as certainly was the case with the ladder in the present instance. To obtain a true analogue to the facts of the present case one must suppose that the accident arose from the domestic servant falling down the area steps of his employer's house, which were in a state which rendered them an unsafe mode of access, and in such a case I do not think that the Court would have much difficulty in coming to the conclusion that the accident arose out of and in the course of the servant's employment. But although the decision is not inconsistent with that in *Robertson* v. *Allan Brothers & Co.* (1), the judgments undoubtedly contain dicta not necessary for the decision which appear to me to be irreconcilable with the previous case, and which will require, in my opinion, to be reconsidered when a case arises which raises the points to which they relate.

On the authorities, therefore, I am of opinion that the contention on behalf of the applicant is right. The importance of the principle involved in this case and the diversity in the views

(1) 98 L. T. 821.

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expressed in the judgments in this and in the previous cases make me hope that an opportunity may be given of its being reviewed by a higher authority so that the law may be finally settled. For this reason I propose to conclude by shortly stating my view on this case, treating it as though the point involved was res integra. The risks incident to an employment are not necessarily confined to what may strictly be called the working hours. Take for example the case of a working man in a deep slate quarry. He may have to report himself at the place where he works at the hour when work begins and continue there till the working hours are over, so that he goes there and comes away in his own time. But if he has to use some perilous means of access, the dangers that he runs in such use are to my mind risks incident to his employment, just the same as those which he runs while actually working. It is by reason of the employment that he becomes subject to those risks, and they are necessarily connected with it. If, therefore, under normal circumstances he becomes exposed to those risks and an accident occurs, it arises, in my view, out of and in the course of his employment. To my mind it is not necessary that the occasion should be an inevitable incident of the employment. If it was open to the workman to dine in the quarry or to go home to his dinner, an accident in going to or coming from dinner would, in my opinion, arise out of and in the course of the workman's employment, just as much as if it had occurred when he was coming to work in the morning or going home at night. It suffices if it happened on an occasion which was a normal incident in the employment.

In the present case—that of a fireman on a ship—the employment is a continuous one, not ceasing during the time that the ship is in port, and it must have been contemplated between the parties that from time to time he would be permitted to go on shore to obtain needful supplies of various articles; and the evidence as to the selection of Sabbath's store, and its announcement to the crew as the authorized house for purchases, would itself be conclusive on this point if specific evidence were needed. Such visits on shore were therefore, to my mind, normal incidents of the employment, and an accident due to

the dangers of access to the ship when the fireman in the course of his duty was returning thereto on such an occasion appears to me to be a typical example of an accident arising out of and in the course of his employment under the general principle which I have above enunciated. In my opinion it would be a lamentable and unjustified limitation of the scope of the Act if we were to exclude such an accident from the benefit of its provisions simply because the sailor had not actually set his foot on the ship when it occurred. For these reasons I am of opinion that the decision of the learned judge of the county court was right and that this appeal should be dismissed with costs.

FARWELL L.J. I agree with the Master of the Rolls, and not with Fletcher Moulton L.J. With all deference to him, I adhere to all I said in *McDonald* v. *Owners of Steamship Banana* (1), from which this case is in my opinion undistinguishable. It is proved that sailors going ashore without written and signed passes were liable to be imprisoned, a most important matter for the captain, and that the men were warned of this and forbidden to go ashore without passes, and the fact that they had not got passes is to my mind conclusive that they had no leave. The learned judge finds, "I am not satisfied that they had passes." The onus of proof is on the applicant, and it is for her to prove that he went on shore with leave. This finding shews that such onus was not discharged. The second finding is that their superiors knew that they were going ashore. This is not a finding that they had leave, nor would such a finding have been possible on the evidence given. The only evidence was positive testimony that they obtained written passes, and this has not been accepted by the judge. Further, I am of opinion that there is not an iota of evidence to support the finding that their superiors (whoever they may be) knew that they were going on shore. Further, the men were on shore for their own purposes, not on ship's business. These findings bring the case exactly within *McDonald* v. *Owners of Steamship Banana* (1), and that case binds us. That case differs from *Robertson* v. *Allan*

(1) [1908] 2 K. B. 926.

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Brothers & Co. (1) by reason of the crucial fact that in the latter case the accident happened on board the ship. In *McDonald* v. *Owners of Steamship Banana* (2), as in this case, it happened while he was on his way to, but before he had reached, the ship. The question of the log is disposed of by Kennedy L.J.'s judgment in *McDonald* v. *Owners of Steamship Banana* (2) In my opinion the learned county court judge was wrong and this appeal should be allowed.

Appeal allowed.

Solicitors: *Busk, Mellor & Norris, for Vaudrey, Oppenheimer & Mellor, Manchester; Johnson, Weatherall & Stuart, for Field & Cunningham, Manchester.*

H. C. R.

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[IN THE COURT OF APPEAL.]

In re A DEBTOR.

Ex parte THE PEAK HILL GOLDFIELD, LIMITED.

Bankruptcy—Mutual Dealings—Set-off—Company—Debenture Stock—Claim to set off Debenture Stock against petitioning Creditor's Debt—Equitable Execution—Receiver of Debtor's Interest in Debenture Stock—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-s.* 3; *s.* 38.

Moneys which under a bankruptcy become payable to the trustee by the petitioning creditor because they were payable to the debtor, come prima facie within the mutual credits section (s. 38), but not if they are moneys which upon bankruptcy become payable to the trustee in his right as trustee, and not by virtue of their being payable to the debtor.

In October, 1908, a debtor holding debenture stock in the petitioning creditor company claimed to be entitled to set this off against the petitioning creditor's debt. In November following, but before the bankruptcy petition was disposed of, a receiver was appointed on behalf of another creditor of the debtor's interest in the debenture stock:—

Held (reversing the decision of the registrar in bankruptcy), that an essential change was effected by the appointment of the receiver; thenceforward there were no mutual credits between the petitioning creditor and the debtor, and though the effect of an adjudication in bankruptcy

(1) 98 L. T. 821. (2) [1908] 2 K. B. 926.

would be to defeat the title of the receiver and give a title to the trustee that would not suffice to bring s. 38 into force, and consequently that the petitioning creditor was entitled to a receiving order.

In re Pollitt, Ex parte Minor, [1893] 1 Q. B. 455, applied.

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APPEAL from the dismissal of a bankruptcy petition by one of the registrars in bankruptcy.

The question raised by this appeal was whether, under the circumstances hereinafter stated, debenture stock of the petitioning creditor (a limited company) held by the debtor could be set off against the petitioning creditor's debt under s. 38 of the Bankruptcy Act, 1883. The material facts, as found by the Court, were as follows:—

In July, 1908, a sum of 1452*l.* 18*s.* 11*d.* was owing to the Peak Hill Goldfield, Limited, from the debtor for costs incurred in litigation with the company.

On July 6, 1908, a bankruptcy notice for the payment of this debt was served upon the debtor by the company. As this notice was not complied with a bankruptcy petition was presented by the company on July 14 in respect of this debt. The hearing of this petition was fixed for July 30. It was admitted that at the date of the filing of this petition the debtor had no defence to it.

On the hearing on July 30 the debtor alleged that he had a counter-claim, and obtained an adjournment to August 27, undertaking to furnish particulars of this counter-claim within ten days. Further adjournments were obtained, and the petition next came on for hearing on October 8. The hearing was not finished on that day, but was continued on October 22, when the receiving order would have been made but that the debtor asked leave to set up a new defence based on his having recently acquired certain debenture stock in the company. Leave was given to set up this defence only on terms of paying the petitioning creditor's costs as a condition precedent, and the hearing of the petition was adjourned till November 5.

It appeared that on October 20 the debtor had acquired debenture stock of the company of the nominal value of 1460*l.*, and on the following day he was registered in respect thereof. By a resolution of the holders of this debenture stock passed on

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October 31 the date for payment was postponed till July, 1910. On November 2 a receiver was appointed on behalf of a judgment creditor for 3500*l.* of the debtor's interest in (inter alia) the said 1460*l.* debenture stock.

On November 11 the registrar held that there were mutual credits between the petitioning creditor and the debtor under s. 38, and, acting under s. 7, sub-s. 3, in his discretion he declined to make a receiving order and dismissed the petition with costs as from October 22, the date on which notice of the alleged credit in respect of these debentures was first given.

The petitioning creditor appealed.

The appeal was heard on December 5 and 7, 1907.

Whinney, for the appellant. There could be no set-off in this case (apart from the question of mutual credits under s. 38 of the Bankruptcy Act), because under the general law only those debts can be set off which are presently due, and by the resolution of the holders of this debenture stock the date for payment has been postponed till July, 1910. No doubt the mutual credits clause has a wider operation, but it does not apply to this case, because a receiver has been appointed of the debtor's interest in this stock, and therefore the debt due from the company is due to the receiver and not to the debtor at all. The effect of that appointment was to divest out of the debtor the whole beneficial interest in the debenture stock, and thenceforward he could do nothing to prejudice the rights of the company.

Shearman, K.C., and *Tindale Davis*, for the debtor. There was here a debt presently payable. A resolution postponing the date of payment of a debt already payable is ultra vires. Further, upon the construction of the resolution, pleading a set-off is not a proceeding to enforce a debt. There was here money due and payable and nothing to take away the right of set-off.

[COZENS-HARDY M.R. referred to *In re Alabama, New Orleans, Texas and Pacific Junction Ry. Co.* (1); *In re English, Scottish and Australian Chartered Bank* (2); *Tyrrell* v. *Painton*. (3)]

It is no use making the debtor a bankrupt if directly this is

(1) [1891] 1 Ch. 213. (2) [1893] 3 Ch. 385.
(3) [1895] 1 Q. B. 202.

done s. 38 applies and there is a set-off. Once bankruptcy happens different considerations apply: *In re G. E. B.* (1)

The order appointing a receiver does not make the judgment creditor a "secured creditor" within the meaning of ss. 9 and 168 of the Bankruptcy Act, 1883: *In re Potts, Ex parte Taylor.* (2) [*Flegg* v. *Prentis* (3) and *De Peyrecave* v. *Nicholson* (4) were also referred to.] If this debtor is made a bankrupt the receivership in favour of the judgment creditor will not avail against the trustee in bankruptcy, and therefore the sum due from the company in respect of this debenture stock will then form part of the debtor's estate and could be set off against the petitioning creditor's, the company's, debt. The Court therefore, in its discretion under s. 7, sub-s. 3, will decline to make a receiving order.

[Cozens-Hardy M.R. referred to s. 45 of the Bankruptcy Act, 1883.]

That section does not apply to equitable execution by the appointment of a receiver, it is limited to execution by way of fi. fa.; "attachment" means attachment by fi. fa. The Court can give such equitable relief as it thinks right where proceedings are only taken to put pressure on the debtor: *Ex parte Griffin, In re Adams.* (5)

[Farwell L.J. referred to *Ex parte Claxton, In re Claxton.* (6)]

Whinney, in reply. The difficulties raised by the respondent are disposed of by *In re Pollitt, Ex parte Minor* (7), which shews that there is no mutuality and no set-off. But for the appointment of the receiver there might have been a set-off, but this appointment of a receiver has entirely changed the state of affairs. The effect of equitable execution by the appointment of a receiver is considered in *In re Marquis of Anglesey.* (8)

Tindale Davis replied on the fresh cases cited in reply.

Cur. adv. vult.

Dec. 18. Cozens-Hardy M.R. This is an appeal from a refusal to grant a receiving order. It is admitted that at the

(1) [1903] 2 K. B. 340.
(2) [1893] 1 Q. B. 648.
(3) [1892] 2 Ch. 428.
(4) (1894) 42 W. R. 702.
(5) (1879) 12 Ch. D. 480.
(6) (1872) L. R. 7 Ch. 532.
(7) [1893] 1 Q. B. 455.
(8) [1903] 2 Ch. 727.

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date of the presentation of the petition, i.e., on July 14, there was a good petitioning creditor's debt to the amount of 1452*l.* 18*s.* 11*d.* But on October 20 the debtor acquired debenture stock of the company, the petitioning creditor, of the nominal value of 1460*l.*, and on the following day he was registered in respect thereof. He alleged that this sum of 1460*l.* had become due and payable, and he claimed to set off the same against the petitioning creditor's debt. In truth it was then due and payable. But by virtue of a resolution passed at a meeting of holders of the debenture stock on October 31 the due date for payment was postponed until July 1, 1910. For the reasons indicated in the course of the argument this resolution, monstrous as it appears to me, was binding and effective. Thenceforward no set-off, properly so called, could arise, for the petitioning creditor's debt was due and payable in presenti, and the sum due from the petitioning creditor, though due in presenti, was not payable until 1910.

On November 2 what is commonly called "equitable execution" was obtained by a judgment creditor for 3500*l.* To be strictly accurate, a receiver was appointed of the debtor's interest in (inter alia) the 1460*l.* debenture stock. The order was in what is now the common form, the receiver being ordered to pay balances to the judgment creditor in or towards satisfaction of his judgment. It is not disputed that such an order has the effect of an injunction and prevents the judgment debtor from receiving the debt, although it does not make the judgment creditor a secured creditor.

In these circumstances the petition came on before Mr. Registrar Linklater on November 11. He held that there were mutual credits between the petitioning creditor and the debtor under s. 38 of the Bankruptcy Act, 1883, and therefore, acting under s. 7, sub-s. 3, he in his discretion declined to make a receiving order.

It is not necessary for me to consider whether, apart from the equitable execution order, I should be prepared to differ from the learned registrar. But it seems to me that an essential change was effected by that order. Thenceforward there were not mutual credits between the petitioning creditor and the

debtor, for it was the receiver, on behalf of the judgment creditor, who alone could receive the debt when payable. No doubt the effect of the adjudication in bankruptcy will be to defeat the title of the receiver and to give a title to the trustee. That, however, will not suffice to bring s. 38 into play. This accords with the view of Lord Esher in *In re Pollitt, Ex parte Minor* (1), and with what I understand to be the invariable practice in bankruptcy when transactions, perfectly valid between the parties, are rendered invalid solely by reason of bankruptcy, such as voluntary settlements or preferences which are fraudulent.

On this short ground, and without discussing the many interesting points which were raised in argument, I am unable to find any reason for refusing a receiving order. And I think the appeal must be allowed with costs.

FLETCHER MOULTON L.J. The facts in this case are complicated by the occurrence of adjournments of the proceedings from time to time, but so far as they are material they are as follows. [Having stated the facts as above to October 22, the Lord Justice continued :—]

In the view that I take of the case it is not important to decide whether or not this capital sum of 1460*l.* was actually payable at the date of the hearing of the petition, or whether (as the petitioning creditor's counsel contended) resolutions validly passed under the conditions under which the debentures were issued had relieved the company from the consequences of its defaults and deferred payment till July, 1910. That which to my mind is material is that on November 2 a receiver was appointed on behalf of a judgment creditor for 3500*l.*, and among the property that he was ordered by the Court to receive were the rents, profits, and moneys receivable in respect of the debtor's interest in the debenture stock in question, and notice of this appointment of the receiver in respect of the debentures was given to the company on the same day. Similar proceedings were taken in another action against the debtor, but it is unnecessary to refer to these, inasmuch as it is not contested that, if the appointment of the first receiver affects the debtor's right to

(1) [1893] 1 Q. B. 455, 458.

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set up the fact of his being registered owner of the debenture stock as a valid answer to the petition, he is unable to sustain his defence. This is the case whether at the material date the right of a holder of these debentures was presently to receive the principal sum or not, inasmuch as the amount of the judgment debt is far larger than any sum that could be due from the company in respect of the debentures.

The petition was finally heard on November 11, and it was dismissed with costs as from October 22, the date on which notice of the alleged credit in respect of the said debentures was first given. The registrar appears to have taken the view that the debt represented by the debenture stock was not presently payable, but that the debtor was entitled under the clause as to mutual credits to set it up as against the petitioning creditor's debt. I am of opinion that in this he was wrong. On that date all moneys payable by the company in respect of the debenture stock were payable to the receiver of the judgment creditor and not to the debtor, and the debtor was not entitled to receive them or to give a discharge for them or to set them up by way of set-off in an action. That this was so was in fact not contested by counsel for the debtor, but they argued that if a receiving order were made the receivership in favour of the judgment creditor it would not avail against the trustee in bankruptcy, and that therefore the sum due from the company in respect of the debentures would form part of the debtor's estate and could be set off against the petitioning creditor's debt and would be sufficient to extinguish it, and that the Court would not in its discretion make a receiving order on a petition presented by a debtor whose debt would disappear in the bankruptcy.

These arguments appear to me to be fallacious. It is true that the right of the receiver for the judgment creditor to receive the proceeds of the debentures would not prevail against that of the trustee in bankruptcy, and the moneys would become payable to the latter. But that would not give to the debtor any rights under the mutual credits clause. It would not make moneys that were, as against the debtor, payable to the judgment creditor payable to the debtor for the purposes of the mutual credits clause. The consequence is that the debtor had not on

November 11 and would not under the bankruptcy acquire any right to avail himself of the mutual credits clause with regard to these moneys which at that date were payable to the judgment creditor and not to himself.

I think that the true principle of law applicable to this case may be formulated as follows: Moneys which under a bankruptcy became payable to the trustee by the petitioning creditor because they were payable to the debtor, come prima facie within the mutual credits clause, but not if they are moneys which, upon bankruptcy, become payable to the trustee in his right as trustee and not by virtue of their being payable to the debtor. It seems to me to be absurd to say that moneys claimable by a trustee only by reason of the exceptional consequences of a bankruptcy can be made use of by a debtor in order to prevent the bankruptcy taking place. I hold, therefore, that there was a good petitioning creditor's debt, and that there was no answer to it either by way of set-off or under the mutual credits clause, and that, therefore, the receiving order ought to have been made and that this appeal must be allowed with costs both here and below.

Farwell L.J. A claim by way of set-off, mutual dealings or the like, is nothing but a plea in the nature of a cross-action, whether it be set up as an answer to the plaintiff in an action or to the petitioner in bankruptcy, and must be proved like any other plea at the hearing. If it then appears that the amount claimed in the plea never had any existence, or has before the hearing been alienated or charged either voluntarily or in invitum to such an extent as to render it inadequate, then the plea fails for want of proof.

In the present case the debtor's plea is met by the appointment of a receiver of the debtor's interest in the debenture stock by way of equitable execution. It is no answer to this to say that such appointment creates no charge or lien; it undoubtedly operates as an injunction restraining the debtor from receiving or dealing with the property comprised in the order, and therefore prevents him from using it as a cross-claim in account with the petitioning creditor. But then it is said that if bankruptcy supervenes the mutual credits clause will apply

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because the appointment of a receiver on behalf of the judgment creditor is inoperative against the trustee, and the result will be that the petitioning creditor's debt will disappear and the debtor will have been adjudicated bankrupt on the petition of a creditor who cannot prove for any debt in the bankruptcy.

But this argument is fallacious. Sect. 38 does not come into operation until after the bankruptcy, and then the bankrupt has no power to call on the trustee to apply it. A bankrupt cannot interfere in the administration of his estate: *Ex parte Sheffield.* (1) There is nothing in *In re G. E. B.* (2) contrary to this. If the debtor has a right of set-off, cross-claim, mutual credit, or the like, which by reason of the express terms of s. 4 cannot be used as an answer to the bankruptcy notice, it may well be that the debtor can use it as an answer to the petition in order to induce the Court, in the exercise of its discretion under s. 7, sub-s. 3, to refuse to make an order; but this is not because of the creation of any new right in the debtor by s. 38, but because the set-off or other claim exists independently of and is compatible with the provisions as to mutual credits in s. 38.

Again, s. 38 requires an account to be taken as between the debtor and the creditor, not as between the trustee in bankruptcy and the creditor, and it is plain that the creditor who has insisted that there is no right of set-off or the like, and has obtained an adjudication of bankruptcy on this footing, cannot be heard to claim such a right in such bankruptcy; nor is there anything in s. 45 or elsewhere in the Act which would enable the creditor in this case to get rid of the effect of the appointment of a receiver—it is the trustee in bankruptcy alone who can do this for the benefit of all the creditors. Whether the trustee in bankruptcy can or cannot apply s. 38 at all in this case is a question on which I express no opinion. I am therefore unable to agree with the learned registrar, and think that this appeal should be allowed.

Appeal allowed.

Solicitors: *Stephenson, Harwood & Co.; Wilde & Co.*

(1) (1879) 10 Ch. D. 434. (2) [1903] 2 K. B. 340.

W. C. D.

[COURT OF CRIMINAL APPEAL.]

1909
Jan. 19.

THE KING *v.* JOHNSON.

Criminal Law—Incorrigible Rogue—Sentence by Quarter Sessions—Appeal—Vagrancy Act, 1824 (5 *Geo.* 4, *c.* 83), *ss.* 3, 4, 5—*Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 19; *s.* 20, *sub-s.* 2.

The appellant was convicted by a petty sessional court of being an incorrigible rogue within s. 5 of the Vagrancy Act, 1824, for that he did beg for alms after having been twice previously convicted of being an idle and disorderly person, and he was sentenced by quarter sessions to one year's imprisonment with hard labour. The appellant petitioned the Home Secretary against his sentence, who referred the case to the Court of Criminal Appeal under s. 19 (*a*) of the Criminal Appeal Act, 1907:—

Held, that a person sentenced by quarter sessions as an incorrigible rogue can under s. 20, sub-s. 2, of the Criminal Appeal Act, 1907, appeal against the sentence, but not against the conviction.

Held, also, that as the appellant had not at some former time been adjudged to be a rogue and vagabond within s. 4 of the Vagrancy Act, 1824, and duly convicted thereof, the quarter sessions had no power to sentence him as an incorrigible rogue.

CASE referred to the Court of Criminal Appeal by the Secretary of State under s. 19 (*a*) (1) of the Criminal Appeal Act, 1907.

(1) Criminal Appeal Act, 1907 (7 Edw. 7, c. 23), s. 19: "Nothing in this Act shall affect the prerogative of mercy, but the Secretary of State on the consideration of any petition for the exercise of His Majesty's mercy, having reference to the conviction of a person on indictment or to the sentence (other than sentence of death) passed on a person so convicted, may, if he thinks fit, at any time either—

"(*a*) refer the whole case to the Court of Criminal Appeal, and the case shall then be heard and determined by the Court of Criminal Appeal as in the case of an appeal by a person convicted; or

"(*b*) if he desires the assistance of the Court of Criminal Appeal on any point arising in the case with a view to the determination of the petition, refer that point to the Court of Criminal Appeal for their opinion thereon, and the Court shall consider the point so referred and furnish the Secretary of State with their opinion thereon accordingly."

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On August 12, 1905, the appellant Johnson was convicted before a Court of summary jurisdiction sitting at Chester Castle of being an idle and disorderly person within the Vagrancy Act, 1824 (1), for that he on August 3, 1905, did unlawfully wander abroad to beg alms, and he was sentenced to one day's imprisonment with hard labour.

On December 12, 1907, he was convicted before a Court of summary jurisdiction sitting at Altrincham of being an idle and disorderly person within the Vagrancy Act, 1824, for that he on December 9, 1907, did unlawfully wander abroad in a certain street to beg and gather alms, and he was sentenced to fourteen days' imprisonment with hard labour.

On October 24, 1908, the appellant was convicted before a Court of summary jurisdiction at Chester Castle of being an incorrigible rogue within the Vagrancy Act, 1824, for that on

(1) Vagrancy Act, 1824 (5 Geo. 4, c. 83), s. 3: ". . . . Every person wandering abroad . . . . to beg or gather alms . . . . shall be deemed an idle and disorderly person within the true intent and meaning of this Act; and it shall be lawful for any justice of the peace to commit such offender . . . . to the house of correction, there to be kept to hard labour for any time not exceeding one calendar month."

Sect. 4: "Every person committing any of the offences hereinbefore mentioned, after having been convicted as an idle and disorderly person . . . . shall be deemed a rogue and vagabond within the true intent and meaning of this Act. . . . ."

Sect. 5: "Every person . . . . committing any offence against this Act which shall subject him or her to be dealt with as a rogue and vagabond, such person having been at some former time adjudged so to be and duly convicted thereof . . . . shall be deemed an incorrigible rogue within the true intent and meaning of this Act; and it shall be lawful for any justice of the peace to commit such offender . . . . to the house of correction, there to remain until the next general or quarter sessions of the peace. . . . ."

Sect. 10: "When any incorrigible rogue shall have been committed to the house of correction, there to remain until the next general or quarter sessions, it shall be lawful for the justices of the peace there assembled to examine into the circumstances of the case, and to order, if they think fit, that such offender be further imprisoned in the house of correction and be there kept to hard labour for any time not exceeding one year from the time of making such order, and to further order, if they think fit, that such offender (not being a female) be punished by whipping, at such time during his imprisonment, and at such place within their jurisdiction, as according to the nature of the offence they in their discretion shall deem to be expedient."

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October 20, 1908, he did unlawfully wander abroad to beg alms, having been twice previously convicted of being an idle and disorderly person, and it was ordered that the appellant be imprisoned and kept to hard labour until the next quarter sessions for the county of Chester, to be then and there further dealt with according to law.

At the Chester county quarter sessions held on October 28, 1908, the appellant was sentenced to one year's imprisonment with hard labour as an incorrigible rogue. The appellant petitioned the Home Secretary against this sentence, who referred the case to the Court as above stated.

R. V. Bankes, for the appellant. This case has been referred to the Court by the Secretary of State under s. 19 (*a*) of the Criminal Appeal Act, 1907, and the case has therefore to be heard and determined by the Court as if it were an appeal by a convicted person. Under s. 20, sub-s. 2, of the Act a person convicted at petty sessions as an incorrigible rogue and sent to quarter sessions to be sentenced can appeal to this Court against the conviction.

[LORD ALVERSTONE C.J. We decided the contrary in *Rex* v. *Brown*. (1) You must argue this case as an appeal against sentence.]

Quarter sessions had no power in the case to sentence the appellant to twelve months' imprisonment with hard labour as an incorrigible rogue. Under s. 5 of the Vagrancy Act, 1824, a person shall be deemed an incorrigible rogue if he commits an offence under the Act which shall subject him to be dealt with as a rogue and vagabond, "such person having at some former time been adjudged so to be and duly convicted thereof." To convict a person as a rogue and vagabond he must, under s. 4, commit an offence within the Act after a previous conviction as an idle and disorderly person. The appellant might, on his second conviction as an idle and disorderly person on December 12, 1907, have been adjudged to be a rogue and vagabond and convicted thereof; but in fact he was not so convicted, but only of being an idle and disorderly person. The

(1) (1908) 72 J. P. 427.

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conditions of s. 5, therefore, had not been fulfilled, and the sentence of quarter sessions cannot be justified. [He referred to Oke's Magisterial Formulist, 8th ed. p. 329, Stone's Justices' Manual, 39th ed. p. 1098, and *Ex parte Reed.* (1)]

Colt Williams, for the prosecution. All the necessary conditions existed entitling the justices to send the appellant to quarter sessions to be dealt with as an incorrigible rogue. It is immaterial that the conviction of December 12, 1907, did not in terms state that the appellant was adjudged to be a rogue and vagabond. The sentence of quarter sessions should not be interfered with on purely technical grounds.

The judgment of the COURT (Lord Alverstone C.J., Bigham and Walton JJ.) was delivered by

LORD ALVERSTONE C.J. It is important that it should be clearly understood under what power the Court is acting in this case. It was decided by this Court in *Rex* v. *Brown* (2) that where a person is convicted at petty sessions under s. 5 of the Vagrancy Act, 1824, as an incorrigible rogue and is sent to quarter sessions to be sentenced, no appeal against his conviction as an incorrigible rogue can be brought before this Court, but that by virtue of s. 20, sub-s. 2, of the Criminal Appeal Act, 1907, an appeal does lie in such a case against the sentence imposed by quarter sessions. That enables the Court to deal with any question appearing on the face of the record, or with a question as to what is the proper sentence in the circumstances, but the Court cannot consider the question whether the conviction should or should not be upheld on the merits.

But the Act by s. 19 (*a*) empowers the Secretary of State, on the consideration of the petition of a convicted person with reference to the conviction or sentence, to refer the whole case to this Court, and the case is then to be heard and determined by the Court as in the case of an appeal. We have, therefore, to deal with this case as if it were the case of an appeal against sentence. Upon that question a point has been raised on behalf of the appellant to which we think effect must be given. It appears upon the

(1) (1858) 22 J. P. 271. (2) 72 J. P. 427.

face of the record that the appellant was convicted on August 12, 1905, and again on December 12, 1907, of being an idle and disorderly person. Then on October 24, 1908, he was convicted of being an incorrigible rogue, and this conviction shews on its face that the appellant was convicted of being an incorrigible rogue because he had been convicted of being an idle and disorderly person on two previous occasions, that is, on August 12, 1905, and on December 12, 1907. Now an idle and disorderly person is a person who has been convicted of any of the offences mentioned in s. 3 of the Vagrancy Act, 1824, one of which is begging, and under s. 4, if a person commits any of the offences mentioned in s. 3 "after having been convicted as an idle and disorderly person," he shall be deemed to be a rogue and vagabond. It does not, however, appear on the face of the conviction of December 12, 1907, that it was a conviction after a previous conviction for being an idle and disorderly person, and the conviction of October 24, 1908, states that the appellant was convicted of being an incorrigible rogue after having been twice previously convicted of being an idle and disorderly person. The question, therefore, which we have to determine is whether two previous convictions as an idle and disorderly person justify a conviction as an incorrigible rogue. That depends on s. 5 of the Vagrancy Act, 1824. [The Lord Chief Justice read s. 5.] If the section stopped after the words "rogue and vagabond," there would in this case have been an offence committed for which the appellant might have been convicted as an incorrigible rogue, but s. 5 goes on to say "such person having been at some former time adjudged" to be a rogue and vagabond "and duly convicted thereof," and it follows, therefore, that in order to justify a conviction of a person of being an incorrigible rogue he must have been previously adjudged to be a rogue and vagabond and duly convicted thereof. The appellant has never been adjudged to be a rogue and vagabond, although he might have been on the occasion of the conviction on December 12, 1907; and as it appears on the face of the conviction of October 24, 1908, that the previous convictions were for being an idle and disorderly person, and not for being a rogue and vagabond, quarter sessions had no power to sentence him as an incorrigible rogue.

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For these reasons we are of opinion that the order of quarter sessions imposing a sentence of twelve months' imprisonment with hard labour must be quashed.

Order quashed.

Solicitor for appellant : *Registrar of Court of Criminal Appeal.*
Solicitor for prosecution : *Director of Public Prosecutions.*

F. O. R.

1909
Jan. 20.

VERNEY, APPELLANT *v.* MARK FLETCHER & SONS, LIMITED, RESPONDENTS.

Factory—Fencing of Machinery—Offence—Limitation of Time for laying Information—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *ss.* 10, 135, 146.

In May, 1905, and again on March 12, 1908, an inspector of factories for the district in which a factory of the respondents was situate visited the factory and found that the fly-wheel of an engine was not fenced as required by the Factory and Workshop Act, 1901. He again visited the factory on July 1, 1908, and found that the fly-wheel was still unfenced. On July 22, 1908, he laid an information against the respondents under s. 135 of the Act for that the factory was on July 1, 1908, not kept in conformity with the Act, in that the fly-wheel was not securely fenced as required by s. 10 of the Act :—

Held, that the information had been laid within three months after the date at which the offence charged in the information came to the knowledge of the appellant within s. 146 of the Act.

CASE stated by justices of Lancashire.

An information was preferred against the respondents for that they were on July 1, 1908, the occupiers of a factory within the meaning of the Factory and Workshop Act, 1901, and that on the said date the factory was not kept in conformity with the Act, that is to say that certain machinery dangerous to persons employed and working there, namely, the fly-wheel of an engine, was not securely fenced as required by the Act. (1)

(1) Factory and Workshop Act, 1901 (1 Edw. 7, c. 22), s. 10, sub-s. 1 : "With respect to the fencing of machinery in a factory, the following provisions shall have effect :—

"(*a*) Every . . . . . fly-wheel directly

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On the hearing of the information the appellant, who was an inspector of factories for the district in which the respondents' factory was situate, deposed as follows: In May, 1905, the appellant visited the respondents' factory and saw the fly-wheel in question. He told the respondents that it was not securely fenced and required them to fence it. On March 12, 1908, he again visited the respondents' factory and found that the same wheel was not securely fenced and again required the respondents to fence it securely. On July 1, 1908, he again visited the respondents' factory and found that the wheel was still not securely fenced. On July 22, 1908, the appellant laid this information against the respondents.

After this evidence had been given the solicitor appearing for the respondents, without going into the merits of the case or calling any evidence, contended that as it appeared from the appellants' evidence that the facts on July 1, 1908, were the same as on March 12, 1908, the offence first came to the knowledge of the appellant more than three months before he laid the information, and that therefore s. 146, sub-s. 1 (1), of the Act of 1901 had not been complied with.

The appellant contended that the offence with respect to which the information was laid was that the respondents' factory

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connected with the steam or water or other mechanical power, ... must be securely fenced."

Sub-s. 2: "A factory in which there is a contravention of this section shall be deemed not to be kept in conformity with this Act."

Sect. 135: "(1.) If a factory or workshop is not kept in conformity with this Act, the occupier thereof shall be liable to a fine not exceeding ten pounds and, in the case of a second or subsequent conviction in relation to a factory within two years from the last conviction for the same offence, not less than one pound for each offence."

(1) Sect. 146: "The following provisions shall have effect with respect to summary proceedings for offences and fines under this Act:—

"(1.) The information shall be laid within three months after the date at which the offence comes to the knowledge of the inspector for the district within which the offence is charged to have been committed, or, in case of an inquest being held in relation to the offence, then within two months after the conclusion of the inquest, so, however, that it be not laid after the expiration of six months from the commission of the offence."

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was not kept in conformity with the Act on July 1, 1908, and that that offence first came to his notice on that date.

The justices upheld the respondents' contention and on that ground dismissed the information. The question for the Court was whether their decision was correct in point of law.

Rowlatt, for the appellant. The offence with which the respondents were charged was an offence committed on July 1, 1908, and the information was therefore laid in time. If the respondents' view is correct, that the time runs either from May, 1905, or from March 12, 1908, it would seem that they have now acquired the right to keep this fly-wheel unfenced for ever.

[He was stopped.]

Avory, *K.C.*, and *Patrick Hastings*, for the respondents. The decision of the justices was right. It may be admitted that in the ordinary case of a continuing offence the offence must, for the purpose of the computation of the time within which proceedings are to be taken, be treated as being committed day by day, and in that case the ordinary limitation under Jervis's Act of six months from the date when the complaint arose does not apply. But this case depends on s. 146 of the Act of 1901, which provides in the clearest of language that the information shall be laid within three months after the date at which the offence comes to the knowledge of the inspector. The policy of the Act is that any defect in complying with the provisions of the Act shall be remedied speedily, but the appellant's contention is an encouragement to inspectors to be supine. The only way of giving proper effect to the language of s. 146 is to say that it means the date at which the offence first comes to the knowledge of the inspector. Any other construction renders the section meaningless. It is not correct to say that, if the respondents' contention prevails, they could continue to keep this fly-wheel unfenced for ever, for s. 17 provides a remedy for that state of things. The contention now put forward on behalf of the appellant might have been, but was not, adopted in *Rex* v. *Taylor* (1), and that case is inferentially a decision in the respondents' favour.

(1) [1908] 2 K. B. 237.

LORD ALVERSTONE C.J. I am of opinion that the decision of the justices was wrong. I do not wish to press unduly against the respondents the admission that in ordinary circumstances the offence with which they were charged would be a continuing offence. I prefer to deal with the language of the Act itself. Sect. 10 provides that fly-wheels must be securely fenced and that a factory in which there is a contravention of that section shall be deemed not to be kept in conformity with the Act, and by s. 135 if a factory is not kept in conformity with the Act an offence is committed. The information in the present case charges the respondents that their factory was on July 1, 1908, not kept in conformity with the Act by reason of the omission to fence their fly-wheel. If that be proved, I have not the slightest doubt that there was on July 1 a direct and continuing breach of the provisions of s. 10. It is said that because in May, 1905, and again in March, 1908, the fly-wheel was unfenced, to the knowledge of the inspector, and the information was not laid until July 22, 1908, the requirements of s. 146 have not been complied with. In my opinion an offence was committed on July 1, 1908, just as much as in March, 1908, or May, 1905, and the offence committed on July 1 came to the knowledge of the inspector on that day, when he visited the respondents' factory. I therefore come to the conclusion that the information was laid in time. It was pointed out in the course of the argument that the result of adopting the contention put forward on behalf of the respondents would be to confer on the respondents a charter to keep this fly-wheel unfenced for ever, and Mr. Avory endeavoured to answer that argument by referring us to s. 17 of the Act. That section merely enables a magistrate to make an order prohibiting the use of machinery which is in such a condition that it cannot be used without danger, but the onus would be on the inspector to prove that the machinery was in a dangerous condition before any order could be made under the section, and it is clear, therefore, that s. 17 could not always be invoked to deal with cases where there has been an offence under s. 10.

It was also suggested that the decision of this Court in *Rex* v. *Taylor*(1) supports the respondents' view of the meaning of s. 146.

(1) [1908] 2 K. B. 237.

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I can find nothing in that case which does so, for the Court was there dealing with an offence under s. 136, not under s. 135.

For these reasons I am of opinion that this case must go back to the justices for them to deal with it on the merits.

BIGHAM J. I agree. I think that the offence in respect of which this information was laid came to the knowledge of the inspector on July 1, and that the proceedings were therefore commenced in time. It is said that the offence was not first discovered on July 1, because the inspector had visited the factory on previous occasions and had then given certain directions with regard to the fencing of the machinery, but that does not in my opinion prevent the offence with which the respondents are charged from having come to the knowledge of the inspector on July 1.

WALTON J. I agree.

Appeal allowed. Case remitted to justices.

Solicitor for appellant: *Director of Public Prosecutions.*

Solicitors for respondents: *Nicol, Son & Jones, for Pickstone & Jones, Radcliffe.*

F. O. R.

THE KING *v.* JUSTICES OF DERBYSHIRE. *Ex parte* NEW MILLS URBAN DISTRICT COUNCIL.

1909
Jan. 22.

Poor Law—Overseer—Solicitor—Exemption—Appeal to Quarter Sessions—Costs—Writ of Privilege—Poor Relief Act, 1601 (43 *Eliz. c.* 2), *s.* 5.

A practising solicitor is exempt from serving the office of overseer of the poor, and if he is appointed to the office by a district council he is entitled to appeal to quarter sessions for an order to quash the appointment; but if the district council do not appear on the appeal to oppose the solicitor's claim to exemption, quarter sessions have no power to order the district council to pay the costs of the appeal.

RULE nisi for a writ of certiorari to bring up and quash an order of the quarter sessions of Derbyshire allowing the appeal of one Bowden, a solicitor, against his appointment by the New Mills Urban District Council as an overseer of the poor for the parish of New Mills and ordering the district council to pay the costs of the appeal.

The facts as disclosed by the affidavits were as follows:—Bowden, who was a solicitor practising at New Mills, was on March 19, 1908, appointed by the New Mills Urban District Council to the office of overseer of the poor for the parish of New Mills. Bowden thereupon informed the council that, as a practising solicitor, he claimed to be exempt from serving the office of overseer of the poor, and he subsequently received a letter from the clerk to the council informing him that he had been appointed an overseer under a misapprehension, and that one Bates had been appointed by the council to be overseer instead of him. The board of guardians, however, contending that Bowden's appointment was good until quashed, refused to recognize Bates' appointment and stated that they would be compelled to treat Bowden as an overseer, and they did so treat him by issuing their precept to him and to the other overseer appointed at the same time as Bowden. In these circumstances Bowden gave notice of appeal to quarter sessions against his appointment as overseer and served the notice of appeal on the district council. On the hearing of the appeal

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the district council did not appear or in any way oppose Bowden's claim to exemption, and quarter sessions allowed the appeal and ordered the district council to pay the costs of the appeal.

This rule nisi was then obtained on behalf of the district council.

E. Sutton (*Moresby White* with him), for Bowden, shewed cause against the rule. Overseers of the poor are appointed under s. 1 of the Poor Relief Act, 1601 (43 Eliz. c. 2), the appointment formerly being made by the justices. A practising solicitor is exempt from serving as an overseer, and, if he is appointed, he is a person "grieved" by an act of the justices within s. 5 of the Act of 1601, and under that section he is entitled to appeal to quarter sessions to obtain an order to quash the appointment: *Rex* v. *Inhabitants of Great Marlow* (1); *Reg.* v. *Cheshire Justices* (2); *In re Overseers of Pudding Norton.* (3) The duties of justices with regard to the appointment of overseers were by the Local Government Act, 1894, transferred to district councils.

[He was stopped.]

Gaches, for the district council, in support of the rule. Quarter sessions had no jurisdiction to deal with this matter. A solicitor is not per se exempt from service as an overseer of the poor; it is the privilege of the High Court of Justice which is invaded by his appointment, because the Court is thereby deprived of his services: *Mayor of Norwich* v. *Berry.* (4) The solicitor should, instead of appealing to quarter sessions, have applied to this Court for a writ of privilege to set aside the appointment, as was done in *Ex parte Jefferies* (5), where the Court granted a writ of privilege to exempt the deputy to the Clerk to the Treasury from serving the office of overseer.

[*Sutton.* The writ of privilege is an obsolete remedy.

LORD ALVERSTONE C.J. In *Rex* v. *Gayer* (6) a lieutenant of marines who had been appointed overseer did not apply for a

(1) (1802) 2 East, 244.
(2) (1840) 4 Jur. 484.
(3) (1864) 33 L. J. (M.C.) 136.
(4) (1767) 1 W. Bl. 636.
(5) (1829) 6 Bing. 195.
(6) (1757) 1 Burr. 245.

writ of privilege, but appealed to quarter sessions, and it was not suggested that he had adopted the wrong course.]

There is no case in which a solicitor has in these circumstances appealed to quarter sessions. In any event quarter sessions had no power to order the district council to pay the costs of the appeal. The district council did not appear on the appeal or in any way oppose the solicitor's claim to be exempt. It has never been the practice to order justices to pay the costs of an appeal if they do not appear to contest it, and in this matter the district council are in the same position as justices. In *Rex* v. *Northumberland Justices* (1) quarter sessions reversed a decision of a district council refusing a pawnbroker's certificate, and it was held that there was no power to order the district council, which had taken no part in the appeal, to pay the successful appellant's costs.

Sutton. The solicitor was aggrieved by an act of the district council, and on appeal that act was declared void and the appointment was set aside. The appeal was therefore decided against the district council within the meaning of s. 5 of Baines' Act (12 & 13 Vict. c. 45), and under that section there was, in the circumstances, power to order the district council to pay the costs of the appeal. [He referred to *Rex* v. *Morris.* (2)]

LORD ALVERSTONE C.J. If the only question raised in this case had been that a solicitor claiming exemption from serving as an overseer of the poor has no right to appeal to quarter sessions against his appointment, I should have been of opinion that this rule must be discharged. It has been contended on behalf of the district council that the only method open to a solicitor of establishing his claim to exemption is by applying to this Court for a writ of privilege. On the other side it is said that the writ of privilege is now obsolete. It is true that it is some time since an application has been made for that writ, but I do not agree that it is obsolete, and I know of no reason why the question of exemption should not now be raised by an application for a writ of privilege. That, however, does not dispose of the question which we have to decide, because it is quite plain

(1) (1907) 96 L. T. 700. (2) (1792) 4 T. R. 550

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Lord Alverstone C.J.

from the authorities, of which *Rex* v. *Gayer* (1) is an example, that this Court has had before it orders of quarter sessions giving effect to claims for exemption from service as an overseer, and has considered whether those orders of quarter sessions are valid; and I can see no reason on principle why, if a person is aggrieved by an order of justices, or of a district council which has now taken the place of justices in this respect, he should not go to quarter sessions and obtain an order establishing his claim to exemption. Therefore, in my view, the first contention raised on behalf of the district council fails.

I think, however, that the other point is good, namely, that the order of quarter sessions is bad in so far as it directed the district council to pay the costs of the appeal to quarter sessions. The original appointment of Mr. Bowden as overseer was not void, but only voidable. There is no reason why a solicitor should not fill the office of overseer if he is willing to do so. The appointment was therefore good as long as it stood, and the district council could not make another appointment until the first appointment had been got rid of. The only way of doing that was by applying to this Court or by going to quarter sessions. Mr. Bowden adopted the latter course. He appealed to quarter sessions, claiming to have his appointment quashed on the ground that he was exempt, but the district council did not appear to oppose the appeal, and there was no question between him and the council which the latter was contesting. If Mr. Bowden had applied to this Court for a writ of privilege and the district council had not appeared to shew cause against the issue of the writ, in my opinion the Court would not have ordered the district council to pay the costs. So by analogy, as the district council did not appear to oppose the appeal to quarter sessions, there was no decision by quarter sessions against the district council within s. 5 of Baines' Act, the only decision being to give effect to the exemption claimed by Mr. Bowden and not resisted by the district council. I do not rely solely on the decision in *Rex* v. *Northumberland Justices* (2), though that was a decision on an analogous matter. I base my judgment on the broad ground that if a person claims

(1) 1 Burr. 245. (2) 96 L. T. 700.

an exemption which has to be established before some competent Court, and the body which has made the appointment, which is prima facie a valid appointment, does not oppose the claim to exemption, and the claim is granted, there is no decision against the body, and in such a case no order for the payment of costs ought to be made. If the body making the appointment had appeared and resisted the claim to exemption, or raised some question of fact which was decided against it, different considerations would arise.

For these reasons I am of opinion that this rule must be made absolute to quash so much of the order of quarter sessions as directed the district council to pay the costs of the appeal to quarter sessions. There will be no costs on either side on this rule.

BIGHAM and WALTON JJ. concurred.

Rule absolute accordingly.

Solicitors for Bowden: *Pritchard, Englefield & Co., for Boote, Edgar & Co., Manchester.*

Solicitors for district council: *Lees & Co.*

F. O. R.

1908
Oct. 20.

LOCAL GOVERNMENT BOARD OF IRELAND *v.* BLACKBURN GUARDIANS.

Poor Law—Removal of Pauper from England to Ireland—Order of Justices made on erroneous Statements of Fact—Appeal by Guardians of Union in Ireland to which Pauper ordered to be removed—Grounds of Appeal—Pauper "liable to be removed to Ireland"—Poor Removal Act, 1845 (8 *&* 9 *Vict. c.* 117), *s.* 2—*Poor Removal* (*No.* 2) *Act*, 1861 (24 *&* 25 *Vict. c.* 76), *s.* 2—*Poor Removal Act*, 1863 (26 *&* 27 *Vict. c.* 89), *s.* 7.

The right of appeal to quarter sessions conferred upon the guardians of any union in Ireland by s. 7 of the Poor Removal Act, 1863, from an order of justices made under s. 2 of the Poor Removal Act, 1845, and s. 2 of the Poor Removal (No. 2) Act, 1861, ordering that a pauper be removed from England to the union in Ireland, is limited to one of two grounds. The appellants must shew either that the pauper was legally settled in some parish in England or was not in law liable to be removed to Ireland. Therefore where a pauper is admittedly liable to be removed to some union in Ireland, but is not removable to that union to which the justices (acting upon erroneous statements of fact by the pauper) have ordered her to be removed, a Court of quarter sessions will not, on appeal by the guardians of the union to which the pauper is so ordered to be removed, set aside the removal order.

Case stated by the recorder of the county borough of Blackburn.

On October 8, 1907, an order was made by two justices for the borough requiring the respondents, the guardians of the poor of the Blackburn Union, to cause a certain pauper named Ellen Lamphier, alias Mihney, and her child James to be safely conveyed to the union of Limerick and to be delivered at the workhouse of that union.

The appellants, the Local Government Board for Ireland, appealed on behalf of the guardians of the Limerick Union against the order. The grounds of the appeal were that the pauper was not in fact born in and had never resided for the space of three years in the Limerick Union or in the county of Limerick.

At the hearing of the appeal the following facts were admitted:—

1. The warrant or order dated October 8, 1907, was made in

pursuance of the powers in that behalf conferred on the justices by virtue of the Poor Removal Act, 1845, s. 2, and the Poor Removal (No. 2) Act, 1861, s. 2.

2. By the Poor Removal Act, 1845, s. 2, it is enacted that "if any person born in Scotland or Ireland, ... not settled in England, become chargeable to any parish in England by reason of relief given to himself or herself . . . . such person . . . . shall be liable to be removed to Scotland, Ireland . . . .; and if the guardians of such parish . . . . complain thereof . . . . any two justices may hear and examine into the matter of such complaint, and if it be made to appear to their satisfaction that such person is liable to be so removed as aforesaid, and if they see fit, they may make and issue a warrant . . . . to remove such person forthwith at the expense of such union or parish."

3. By the Poor Removal (No. 2) Act, 1861, after reciting that it is expedient to provide better means for the safe conveyance to their place of destination in Ireland of poor persons who may be removed in pursuance of the Act of 1845, it is enacted (s. 2) that "such warrant of removal shall be granted only on the application of the relieving officer or other officer of the guardians of the union . . . . where such poor person shall become chargeable, and shall contain the name and reputed age of every person ordered to be removed by virtue of the same, and the name of the place in Ireland where the justices . . . . shall find such person to have been born or to have last resided for the space of three years . . . . provided . . . . that in any case where the justices . . . . shall not be able to ascertain upon the evidence before them the place of birth, or of such continued residence as aforesaid, they shall order the pauper to be removed to the port in Ireland which shall in the judgment of such justices under the circumstances of the case be most convenient."

4. By the warrant of October 8, 1907, the justices found on the oath of the pauper that she was of the reputed age of thirty years and was born in Ireland, in the parish of Limerick in the county of Tipperary and Limerick Poor Law Union, and last resided for the space of three years in the parish of Limerick,

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now contained in the union of Limerick, and had not a settlement in England, and was not otherwise exempt from removal from the Blackburn Union nor from England. The pauper from time to time made contradictory statements as to her places of birth and residence in Ireland, but there was no evidence before the recorder as to whether this conflict of testimony was known to the justices at the time they made the order.

5. The pauper was in truth born at Parkstown, in the Thurles Union, county Tipperary, Ireland, on March 1, 1871.

6. Parkstown is in the union of Thurles and not in the union of Limerick, the two unions being adjacent. Limerick is a port situated in the Limerick Poor Law Union.

7. The pauper had not resided for three years in the union of Limerick so as to acquire a settlement there.

8. She first came to England in March, 1906.

9. She came to reside in Blackburn about July, 1907, and was not legally settled in any parish or township in England.

10. The right of appeal (if any) was derived from s. 7 of the Poor Removal Act, 1863, which enacts that "If the board of guardians of any union in Ireland think themselves aggrieved by the removal of any poor person, and if they forward to the Poor Law Commissioners" (now the Local Government Board) "for Ireland a statement of the grounds for concluding that such poor person is legally settled in any parish or township in England, or was not in law liable to be removed to Ireland, and if such board of guardians, or any person on their behalf, shall agree to pay all costs which may be incurred in any necessary preliminary inquiry, and in the appeal against the warrant for the removal of such poor person, such Commissioners, if satisfied that it will be expedient to do so, may appoint some person to make a preliminary inquiry into the circumstances attending such removal, and after such inquiry may, if they think fit, appeal on behalf of the guardians so aggrieved to the Court of quarter sessions held for the county or borough within which the parish or township from which such removal was made is situate, at any time within six months after such removal was completed; and such Commissioners shall, at least twenty-one days before the

holding of such sessions, send by post to the guardians or overseers on whose application such warrant was obtained notice in writing purporting to be signed by their secretary or chief clerk of their intention to appeal against such warrant, containing a statement in writing of the grounds of such appeal, and such Court of quarter sessions shall hear and determine such appeal . . . ."

11. On January 28, 1908, the guardians of the Limerick Union agreed by resolution to indemnify the Local Government Board for Ireland in any proceedings they might take in the case of the pauper. On February 19, 1908, they forwarded to the Local Government Board for Ireland a statement and letter purporting to contain the grounds for concluding that the pauper was legally settled in some parish in England or was not in law liable to be removed to Ireland.

12. The Local Government Board for Ireland duly made a preliminary inquiry and were satisfied that the pauper was born and resided up to March, 1906, in the Thurles Union.

13. Upon the above facts counsel for the appellants contended that the appeal was by virtue of the Poor Removal Act, 1863, s. 7, against the warrant or order, and that the warrant or order was bad inasmuch as it was admitted by the respondents that the facts found as to the places of birth and residence of the pauper were incorrect; that the right of appeal was not limited to the two grounds, namely, that the pauper had acquired a legal settlement in England, and that the pauper was not in law liable to be removed to Ireland, in the sense of being liable to be removed to any part of Ireland, but that those words must be taken to mean liable to be removed under the warrant or order actually made to that part of Ireland with which the union that considers itself aggrieved is concerned; that a person is not in law liable to be removed to Ireland within the meaning of the section until the warrant or order is granted, and is then so liable only upon the findings of fact contained in the warrant or order; that the warrant in this case was bad, and the fact that another warrant based upon different findings of fact might have been issued by the justices under which it is alleged that the pauper could have been removed to Limerick (as a convenient

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port) does not make the procedure actually adopted legal; that the expressions in s. 7 of the Act of 1863, "legally settled in England" and "not in law liable to be removed to Ireland," are inserted as a guide to the Poor Law Commissioners and as a safeguard against frivolous and vexatious appeal, and not with a view to restricting in any way the right of appeal against a warrant or order based upon erroneous findings of fact by a union aggrieved thereby.

14. Counsel for the respondents contended (inter alia) that there was no right of appeal except upon the ground that the pauper was legally settled in a parish or township in England or was not in law liable to be removed to Ireland; that the pauper in this case, not having acquired a legal settlement in any parish in England or become irremovable from England, was liable to be removed to Ireland.

15. The recorder was of opinion that the right of appeal was limited under s. 7 of the Poor Removal Act, 1863, to one of two grounds, and that the appellants must shew either that the pauper was legally settled in some parish in England or was not in law liable to be removed to Ireland. The first ground, it was conceded, did not arise, and as to the second the recorder was of opinion that, as the pauper was admittedly liable to be removed to some union in Ireland, she was a pauper liable to be removed to Ireland within the meaning of the section. He therefore confirmed the order and dismissed the appeal.

16. If the Court should be of opinion that the recorder was right in dismissing the appeal the order was to stand confirmed; otherwise it and the order of the recorder confirming the same were to be quashed.

The warrant or order of October 8, 1907, was as follows:—

"To the Guardians of the Poor of the Blackburn Union in the county of Lancaster, England.

"To the Guardians of the Poor of the Limerick Union in the county of Tipperary in Ireland.

"At a petty sessions of His Majesty's justices of the peace for the said county borough of Blackburn held at Blackburn aforesaid on the eighth day of October in the year of our Lord one thousand nine hundred and seven before us the

undersigned, His Majesty's justices of the peace for the said county borough.

"Whereas complaint is now made by the Guardians of the Poor of the Blackburn Union in the county of Lancaster that Ellen Lamphier alias Mihney and her child James aged five weeks have become and are now chargeable to the Blackburn Union. And whereas the said Ellen Lamphier alias Mihney and her child James having been brought before us, and application having been made to us in petty sessions assembled, by Charles Edward Bygrove, clerk of the said guardians, on their behalf, we have made due examination on oath and find that the said Ellen Lamphier is of the reputed age of thirty years, and was born in Ireland in the parish of Limerick in the county of Tipperary and Limerick Poor Law Union and last resided for the space of three years in the said parish of Limerick in the county of Tipperary now contained in the said union of Limerick, and hath not a settlement in England, and is not otherwise exempt from removal from the said Blackburn Union nor from England, and that she hath a child named James of the reputed age of five weeks which child is not exempt from removal from the said union, and we have seen the said Ellen Lamphier and her child and are satisfied that the said Ellen Lamphier and her child are in such a state of health as not to be liable to suffer bodily or mental injury by the removal.

"These are therefore to require you, the Guardians of the Poor of the Blackburn Union, to cause the said Ellen Lamphier and her child James to be safely conveyed to the said union of Limerick and to be delivered at the workhouse of such union."

M. Shearman, K.C., and *Acton*, for the appellants. Under the Poor Removal Act, 1845, s. 2, there was a right to deport from England to Ireland a pauper born in Ireland and not settled in England; but that general right of removal was qualified by the Poor Removal Act, 1861, s. 2, under which there is a specific right of removal to a particular place only. That place is where the pauper was born or last resided for the period of three years unless the justices are not able to ascertain the place of birth or residence for three years, when they are to order the

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pauper to be removed to the most convenient port in Ireland. Sect. 2 of the Act of 1861 supersedes any right to remove the pauper under s. 2 of the Act of 1845. The result is that the words in s. 7 of the Poor Removal Act, 1863, "liable to be removed to Ireland," must be read as "liable to be removed to the particular place in Ireland to which the pauper has been ordered to be removed by the justices." In the present case the order was that the pauper was to be removed to Limerick, and as she was not in fact born there, nor had she resided there for three years, she was not in law liable to be removed there and the order was bad. It cannot have been the intention of the Legislature that because the pauper is liable to be removed to some other union in Ireland, Limerick, the aggrieved union, should have no right of appeal.

Further, the pauper was not in law "liable to be removed to Ireland" within the meaning of s. 7 of the Poor Removal Act, 1863, inasmuch as she only became liable to be removed when the order for removal was made, and the order being based upon erroneous facts was bad. But, assuming that "liable to be removed to Ireland" means that "facts exist which make the pauper liable to an order to be removed to Ireland," the words "under this or any other statute" must be read in after "Ireland," and inasmuch as "Ireland" means the particular union to which the pauper could be removed under the Poor Removal Act, 1861, and she was not on the true facts liable to be removed to Limerick, the order and warrant are bad.

Macmorran, K.C., and *W. Mackenzie*, for the respondents, were not called upon.

LORD ALVERSTONE C.J. It appears to me that, when the relative position of the poor law authorities of England and Ireland is considered, the judgment which we ought to give in this case is clear, and that the learned recorder has based his decision upon the right ground. The true construction of the various statutes is in no way doubtful when they are read chronologically. Sect. 2 of the Poor Removal Act, 1845, provides that if any person

born in Ireland becomes chargeable to any parish in England, such person shall be liable to be removed to Ireland, and I will assume in favour of the appellants (I am inclined to think that the assumption is probably correct, although it is not necessary to determine the point) that the form of warrant in Sched. C of the Act of 1845 refers to the particular union to which the pauper is to go, or at any rate that there is a form of warrant substituted under s. 2 of the Poor Removal Act, 1861, which refers to the particular union. To that extent there may be said to have been some interference with what I may call the local liability to maintain a pauper in Ireland in that he was ordered to go to a particular union. Sect. 2 of the Poor Removal Act, 1861, contemplates that upon the justices being informed of the facts mentioned in the section they should order the pauper to be removed to the particular union. That view is confirmed by the later form of warrant which is given in Sched. I. of the Poor Removal Act, 1863. It is important to observe the proviso contained in s. 2 of the Poor Removal Act, 1861, because it shews that that statute contemplates removal to Ireland (and removal to Ireland only), as did the Poor Removal Act, 1845, in the provisions it contains relating to Ireland, and that both statutes only indicate that the pauper is to go to a particular place or port as a kind of machinery for the purpose of carrying out the removal. When the order of October 8, 1907, was made, the information before the justices complied with the provisions of s. 2 of the Poor Removal Act, 1861, inasmuch as the woman had given the place of her birth, her age, and the other particulars required by that section to be stated in the warrant. The particulars given by her were in fact untrue, but so far as the order was concerned it was made on proper materials which were supplied to the justices. The question, therefore, now arises whether the guardians of the particular union in Ireland to which the pauper has been ordered to be removed can come forward and say that the justices have selected the wrong union in Ireland, and that the whole order is bad because it has proceeded upon an incorrect statement. The guardians of the appellant union admit, as indeed they are compelled to, that if the justices had made an order for the removal of the

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pauper to Limerick, as being the nearest port, they could not have raised any objection; but they contend that because the justices acted on the erroneous statements of fact of the pauper they can successfully appeal to this Court on the ground that the whole order was improperly made. In my judgment the validity of the order depends entirely on the rights given to the guardians of the Limerick Union under the Poor Removal Act, 1863.

I do not know (and I do not express any opinion upon the matter) what the rights are as between various unions, parishes, districts, or counties in Ireland, but the Legislature has provided by s. 7 of the Poor Removal Act, 1863, for objection being taken by the Irish authority to warrants for removal of paupers. That section does not say that an objection may be taken to the warrant on the ground that the pauper was not legally liable to be removed to the union in Ireland to which he was sent, but on the ground that he was not legally liable to be sent to Ireland; and probably it was considered that there ought not to be the general right of appeal which would enable the rights of different unions in Ireland as between themselves to be litigated in England, but that for the purpose of attacking the order they must shew that the pauper ought not to have been sent to Ireland at all. That appears to me to be a perfectly reasonable system of legislation, but, whether reasonable or not, the power of appeal given by s. 7 of the Poor Removal Act, 1863, is not a general power, but a right of appeal given to the guardians of the poor law union, if they are able to say by their statement that the person is legally settled in any parish in England or is not in law liable to be removed to Ireland. In the present case it is admitted that the pauper was liable to be removed to the Thurles Union in Ireland.

In my judgment the question as between the unions of Limerick and Thurles could not be raised on this appeal, and the justices have come to a proper conclusion on the point before them.

BIGHAM J. I agree for the reasons given by the recorder in paragraph 15 of the case stated by him. I cannot express

those reasons better than he has done. I am of opinion that the appeal should be dismissed.

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WALTON J. I agree.

Appeal dismissed.

Solicitors for appellants: *Burton, Yeates & Hart, for E. Cooper & Son, Blackburn.*

Solicitors for respondents: *Pritchard, Englefield & Co., for Malam Brothers & Son, Blackburn.*

J. E. A.

THE KING *v.* NORFOLK JUSTICES. *Ex parte* WAYLAND UNION.

1908
Nov. 4.

Poor Law—Removal Order—Notice of Appeal—Validity—Entry of Appeal at next Sessions—Jurisdiction of subsequent Sessions—Poor Relief Act, 1662 (13 *&* 14 *Car.* 2, *c.* 12), *ss.* 1, 2—*Poor Law Amendment Act*, 1834 (4 *&* 5 *Will.* 4, *c.* 76), *s.* 81—*Poor Law Procedure Act*, 1848 (11 *&* 12 *Vict. c.* 31), *s.* 9.

On February 26, 1908, an order of removal of a pauper and her child from the Wayland Union to the Forehoe Union was made. Both unions are in the county of Norfolk. On March 31, 1908, the Forehoe Union gave notice of appeal against the order. The notice did not mention any sessions as those to which it was intended to appeal. On April 8 a Court of quarter sessions for the county of Norfolk was held, but no appeal against the order of removal was entered for those sessions. The succeeding quarter sessions were held on July 1, 1908, and the appeal against the order was entered for those sessions. The parties treated the notice of appeal as being given for those sessions:—

Held, that the sessions of July 1, 1908, had jurisdiction to hear the appeal and to decide whether it had been entered at the next practicable sessions so as to comply with the requirements of the Poor Relief Act, 1662, s. 2.

Held, further, that as the parties treated the notice of appeal as having been given for the sessions of July 1, 1908, the objection could not be taken that it applied only to the sessions of April 8.

RULE nisi calling upon the justices for the county of Norfolk to shew cause why a writ of certiorari should not issue directed to them to remove into the High Court of Justice certain orders

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made by them or some of them at the general quarter sessions of the peace for the county held on July 1, 1908, on an appeal between the guardians of the poor of the Forehoe Union, appellants, and C. J. Randolph and T. C. Frost, two justices for Norfolk, and the guardians of the Wayland Union, respondents, against an order of the two last-mentioned justices dated February 26, 1908, adjudging the settlement of Katie Florence Scase and her two children Charles William Mason and Robert William Scase to be the parish of Hingham, and directing their removal from the Wayland Union to the Forehoe Union, by which order of sessions it was ordered that the appeal should be allowed. The rule was obtained at the instance of the guardians of the Wayland Union on the grounds (1.) that the Norfolk Court of quarter sessions of July 1, 1908, had no jurisdiction to hear the appeal, as it should have been entered for the quarter sessions held on April 8, 1908, and (2.) that the notice of appeal, which was dated March 31, 1908, was an invalid notice.

It appeared from the affidavits that a copy of the order of removal was received by the Forehoe guardians from the Wayland guardians on February 27, 1908. On March 13, 1908, the clerk to the Forehoe guardians wrote to the clerk to the Wayland Union inquiring where a copy of the depositions upon which the order was made could be obtained, and was referred by him to the clerk to the Wayland justices, from whom he received the copy of the depositions on March 19, 1908. On April 1, 1908, the clerk to the Wayland guardians received a letter dated March 31, 1908, from the clerk to the Forehoe guardians, giving notice of appeal in the following terms:—"I am directed by the guardians of the Forehoe Incorporation to give you notice of appeal against the order of removal made in the case of Katie Florence Scase, together with her two children, Charles William Mason and Robert William Scase, made the 26th day of February, 1908, signed by C. J. Randolph and Thomas Crawshay Frost. The grounds of the appeal are:—(1.) That the husband of the said Katie Florence Scase is not settled in the Poor Law Union of Forehoe, but in the parish of Hardingham, in the Poor Law Union of Mitford and Launditch. (2.) That imprisonment does not constitute a break of residence." On April 8, 1908, a Court

of quarter sessions for the county of Norfolk was held at Norwich, but no appeal against the order of removal was entered for those sessions and neither party attended. On June 10, 1908, the Wayland guardians received further grounds of appeal from the Forehoe guardians. An appeal against the order of removal was entered by the Forehoe guardians for the quarter sessions held for the county of Norfolk on July 1, 1908.

Before the merits of the case were gone into by the Norfolk Court of quarter sessions held on July 1, 1908, an objection was made by counsel on behalf of the Wayland Union that the Court ought not to hear the appeal.

The grounds of the objection were, first, that the guardians of the Forehoe Union were entitled only to enter the appeal at the quarter sessions held on April 8, 1908, those being the next practicable quarter sessions after the order was made (1); and,

(1) Poor Relief Act, 1662, s. 1: "It shall and may be lawful upon complaint made by the . . . . overseers of the poor of any parish . . . . for any two justices of the peace . . . . of the division where any person or persons that are likely to be chargeable to the parish shall come to inhabit, by their warrant to remove and convey such person or persons to such parish where he or they were last legally settled."

Sect. 2: "All such persons who think themselves aggrieved by any such judgment of the said two justices may appeal to the justices of the peace of the said county, at their next quarter sessions, who are hereby required to do them justice according to the merits of their cause."

Poor Law Amendment Act, 1834, s. 81: "In every case where notice of appeal against" an order of removal "shall be given, the overseers or guardians of the parish appealing against such order, or any three or more of such guardians, shall, with such notice, or fourteen days at least before the first day of the sessions at which such appeal is intended to be tried, send or deliver to the overseers of the respondent parish a statement in writing under their hands of the grounds of such appeal; and it shall not be lawful for the overseers of such appellant parish to be heard in support of such appeal unless such notice and statement shall have been so given as aforesaid: Provided always, that it shall not be lawful for the respondent or appellant parish, on the hearing of any appeal, to go into or give evidence of any other grounds of removal, or of appeal against any order of removal, than those set forth in such respective order, examination, or statement as aforesaid."

Poor Law Procedure Act, 1848, s. 9: "No appeal shall be allowed against any order of removal if notice of such appeal be not given as required by law, within the space of twenty-one days after the notice of chargeability and statement of the grounds of removal shall have

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secondly, that the notice contained in the letter of March 31, 1908, was not a good notice of appeal inasmuch as it omitted to state to what Court and at what quarter sessions an appeal would be made, or alternatively was only a good notice for the quarter sessions held on April 8, 1908.

It appeared from a letter written by the clerk of the peace for the county of Norfolk that there was no written rule as to the entry of appeals at the Norfolk sessions, but it was the practice to require seven days' notice in order that the appeal might be put on the agenda paper for the information of the justices. The objections were fully argued before the Court by counsel on behalf of the respondents and appellants, and the Court, after ascertaining all the facts and the dates of the meetings of the guardians and reading the minutes of the board of guardians relating to the case which were produced before them, decided that the notice of appeal was sufficient and that the next practicable quarter sessions were the quarter sessions held on July 1, 1908, and not those held on April 8, 1908, and they consequently decided to hear the appeal and, after hearing the facts of the case, allowed the appeal.

Ernest Wild and *H. Claughton Scott*, for the Forehoe guardians, shewed cause. The Forehoe guardians had, by virtue of s. 9 of the Poor Law Procedure Act, 1848, thirty-five days after the order of removal was made within which to give notice of appeal, inasmuch as they applied for a copy of the depositions within twenty-one days, although the authorities seem to shew that they were not absolutely entitled to the thirty-five days if by reasonable diligence they could have given notice of appeal before. The question as to whether or not the sessions held on

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been sent by the overseers or guardians of the removing parish to the overseers or guardians of the parish to which such order shall be directed, unless within such period of twenty-one days a copy of the depositions shall have been applied for as aforesaid by the last mentioned overseers or guardians, in which case a further period of fourteen days after the sending of such copy shall be allowed for the giving of such notice of appeal; but in such case no poor person shall be removed under such order of removal until the expiration of such further period of fourteen days."

April 8, 1908, were the next practicable sessions for the hearing of the appeal within the meaning of the Poor Relief Act, 1662, s. 1, was a matter in the discretion of the Court of quarter sessions held on July 1, 1908. This Court will not review the decision of the Court of quarter sessions upon the facts. The Forehoe guardians could not enter an effective appeal at the sessions held on April 8, 1908, as the period between the giving of the notice of appeal and the first day of sessions was less than fourteen days; and fourteen days' notice of the grounds of appeal is required by the Poor Law Amendment Act, 1834, s. 81. Moreover, a writ of certiorari will not be granted where justice has been done.

Rawlinson, K.C., and *Sydney Davey*, for the Wayland Union, in support of the rule. The decision in *Reg.* v. *West Riding Justices* (1) shews that the appellants were bound, having given notice of appeal, to enter the appeal at the next sessions. The notice of March 31, 1908, was an effective notice for the sessions of April 8, 1908, assuming it to be good in form. The effect of the decision in *Reg.* v. *West Riding Justices* (1) is that the parish against whom a removal order is made has generally thirty-five days before notice of appeal need be given. If there is then time to give an effective notice of appeal, it must be given. If there is not time, the appeal must be entered and respited. The decision in *Reg.* v. *Sussex Justices* (2) shews that notice of appeal must be given and the grounds of appeal must also be delivered. As to notice of appeal, no time is fixed as to its length, except by the practice of the particular sessions. But fourteen days' notice of the grounds of appeal must be given. *Reg.* v. *Derbyshire Justices* (3) is distinguishable. There the thirty-five days had not expired before the first day of the sessions, and the appellants were therefore not bound to enter and respite the appeal, and it was for the justices at the sessions at which the appeal was heard to determine whether the appellant had been dilatory: *Reg.* v. *Surrey Justices* (4); *Reg.* v. *Peterborough Justices* (5); *Rex* v. *Southampton Justices.* (6) If an

(1) (1858) E. B. & E. 713.
(2) (1865) 4 B. & S. 966.
(3) (1871) 35 J. P. 663.
(4) (1880) 6 Q. B. D. 100.
(5) (1857) 7 E. & B. 643.
(6) (1817) 6 M. & S. 394.

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effective notice of appeal can be given for the next sessions there is no right to pass them over: *Reg.* v. *Inhabitants of Sevenoaks* (1); *Liverpool Gas Co.* v. *Everton.* (2) The decisions in *Reg.* v. *Sussex Justices* (3) and *Reg.* v. *West Riding Justices* (4 are in favour of the Wayland Union.

The notice of appeal is bad in form. It does not specify the sessions to which the appeal is to be brought nor the date upon which they are to be held. As the notice was given on March 31, 1908, it was effective for the sessions held on April 8, and for those only, inasmuch as s. 2 of the Poor Relief Act, 1662, which gives the right of appeal, provides that it is to be to the next sessions. It is just that those words should be construed as meaning the "next practicable sessions" in order to give appellants time to make up their minds as to the advisability of an appeal; but when they have once given notice of appeal, there is no reason why the direction contained in the Act of 1662 should not be complied with and the appellants be required to enter their appeal at the sessions next following. Any injustice can be avoided by the Court of quarter sessions adjourning the appeal. The effect of the authorities is that in considering which are the first practicable sessions regard should be had to the fact that time must be allowed appellants for making up their minds whether to appeal or not, and also to any rules of sessions requiring notice of appeal to be given so many days before the first day of sessions: *Reg.* v. *Surrey Justices* (5); *Liverpool Gas Co.* v. *Everton.* (2) If the rule of sessions cannot be complied with, it follows that the next Court of quarter sessions would be bound to adjourn, even though the notice of appeal to those sessions were given, and it must be admitted that in that case giving the notice for those sessions and so entering and respiting the appeal would be a useless formality. In the present case, however, no such rule existed, and the Court of quarter sessions sitting on April 8, 1908, could have exercised their discretion as to an adjournment. *Reg.* v. *West Riding Justices* (4) shews that an appeal should

(1) (1845) 7 Q. B. 136.
(2) (1871) L. R. 6 C. P. 414.
(3) 4 B. & S. 966.
(4) E. B. & E. 713.
(5) 6 Q. B. D. 100.

have been entered at the April sessions. As regards the notice of appeal it is void for uncertainty, as under it the respondents could not know whether to prepare for trial for the sessions of April 8, 1908, or July 1, 1908.

LORD ALVERSTONE C.J. I am of opinion that this rule must be discharged. It was obtained on two grounds—(1.) that the Court of quarter sessions held on July 1, 1908, had no jurisdiction to hear the appeal, as it ought to have been entered for the quarter sessions held on April 8, 1908; (2.) that the notice of appeal dated March 31, 1908, was an invalid notice. If the justices by finding facts wrongly had assumed to give themselves jurisdiction when in fact they had none, that would have been a ground for the matter being open to revision in this Court if the facts were clear upon the affidavits. But there is not in any of the affidavits in support of the rule any suggestion that the magistrates have purported to give themselves jurisdiction by finding facts wrongly. The real points are as to whether there was jurisdiction in the Court of quarter sessions held on July 1, 1908, and whether the notice of appeal was bad. I have no doubt that it was for the justices sitting at the Court of quarter sessions of July 1, 1908, to decide what was the next practicable sessions. The law on this point, after a great deal of discussion, has been pretty well settled. Manisty J. in *Reg.* v. *Surrey Justices* (1) said: "An appellant cannot, by any conduct on his part, make impracticable the sessions which otherwise are the next practicable sessions . . . . But unless the proper notices can be given, and the appeal tried, the better view seems to be that it is not requisite to go through the ceremony of entering." In the present case, if it could have been shewn that the appellants by their conduct had made the sessions of April 8 impracticable, it would have been open to us to say that those sessions were in fact practicable sessions. In *Rex* v. *Southampton Justices* (2) the Court held that the fact that by the practice of the sessions one more day's notice of appeal was required than that which could have been given did not make the sessions practicable because the appeal could have been entered. In each

(1) 6 Q. B. D. 100, at p. 107. (2) 6 M. & S. 394.

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case it has to be considered whether, on the assumption of there being no carelessness on the part of an appellant, the sessions for which notice of appeal is given are the next practicable sessions. In support of the rule it was contended that because the notice was given before April 8, 1908, therefore the sessions held on that date must have been the next practicable sessions. It would be near the line if, seven days' notice having by the practice of the sessions to be given, it had been received on April 1, 1908, the sessions being held on April 8, 1908.

Upon the question as to want of jurisdiction in the sessions of July 1, 1908, it was contended in support of the rule that if an appellant wishes to contend that a possible sessions is not a practicable sessions he must go to the first sessions and enter and respite the appeal before the later sessions can consider the question. *Liverpool Gas Co.* v. *Everton* (1) is conclusive against this contention. The recorder there allowed an appeal to be entered at subsequent sessions on the ground that the previous sessions were not the "next practicable." Montague Smith J. went into the merits and reviewed the discretion of the recorder altogether and did not suggest that the recorder had no jurisdiction. Therefore both on the authorities and on the general principle to be deduced from them, if an appeal is properly brought to sessions and an objection is taken that they are not the next practicable quarter sessions, the quarter sessions have power, subject to review, to decide that question. We have no evidence that the justices exercised their jurisdiction wrongly in deciding that it was not improper to treat the sessions of July 1, 1908, as the next practicable sessions.

With regard to the point as to the validity of the notice of appeal itself, it is not necessary to decide what may be the right view to take of its construction, but in my opinion we ought not to quash the order of sessions for want of jurisdiction on the ground that it is of a vague character. In support of the rule it was contended that it must be treated as a notice for the sessions of April 8, 1908, because a valid notice could have been given for those sessions. Whatever may be its true construction, it was treated as a notice for the sessions of July 1, 1908, and

(1) L. R. 6 C. P. 414.

in my judgment we ought not to quash the order of quarter sessions on the ground of an imperfection in the notice of appeal, even if there be any.

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WALTON J. I am of the same opinion.

SUTTON J. I agree.

Rule discharged.

Solicitors for Wayland Union: *Foulger, Robinson & Co., for Robinson & Sons, Watton.*

Solicitors for Forehoe Union: *Callard & Vulliamy, for Vulliamy & Son, Ipswich.*

J. E. A.

[IN THE COURT OF APPEAL.]

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Highway—Repair—Extraordinary Traffic—Extraordinary Expenses—Limitation of Time for bringing Action—Damage resulting from Building Contract —"Completion of Contract"—Highways and Locomotives (Amendment) Act, 1878 (41 & 42 *Vict. c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 12, *sub-s.* 1 (*b*).

In s. 12, sub-s. 1 (*b*), of the Locomotives Act, 1898, which provides that proceedings for the recovery of expenses of extraordinary traffic, "where the damage is the consequence of any particular building contract, or work extending over a long period, shall be commenced not later than six months after the completion of the contract or work," the term "building contract" means a contract for the building of any physical construction and the term "completion of the contract" means completion so far as concerns the constructional work comprised therein; and, where the constructional work consists of several component parts so closely connected that each would be useless without the others, the period of six months begins to run from the completion of the whole work, notwithstanding that the damage to the roads may have been caused exclusively by the haulage of materials in connection with some or one only of the component parts of the work.

Quære whether different considerations may not apply to contracts comprising several independent works; also to contracts comprising work in several different districts where it is shewn that all the work

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within the district of the plaintiff authority has been completed more than six months before the commencement of the action.

Accordingly, where the work comprised in a contract included the construction of a reservoir and the laying of a line of pipes therefrom within the plaintiffs' district, and damage was caused to the roads of the district by haulage in connection with the laying of the pipes, but not in connection with the construction of the reservoir:—

Held, that the contract was a building contract for one compound work, which was a work extending over a long period within the meaning of the sub-section, and that an action for recovery of expenses commenced more than six months after the completion of the line of pipes but before the completion of the reservoir was in time.

Lancaster Rural District Council v. *Fisher and Le Fanu*, [1907] 2 K. B. 516, explained and applied.

APPEAL from a decision of Channell J.

The action was brought under the Highways and Locomotives (Amendment) Act, 1878, as amended by the Locomotives Act, 1898, by the Carlisle Rural District Council against the corporation of Carlisle to recover extraordinary expenses incurred by the plaintiffs as the highway authority in repairing certain highways in their district by reason of damage caused by extraordinary traffic thereon.

The damage was occasioned by the haulage of pipes and bricks along the roads in question for the purpose of certain waterworks which were being constructed by the defendant corporation. These works included the construction of a large collecting reservoir at Geltsdale, which was situate about ten miles south-east of Carlisle and was outside the plaintiffs' district, the construction of certain filter beds at Castle Carrock, also outside the plaintiffs' district, and the construction of a service reservoir at Cumwhinton, within the plaintiffs' district; and also the laying down of two lines of pipes, namely, a line of 16-inch pipes, hereinafter called intake pipes, running from the Geltsdale reservoir to the filter beds and thence to the service reservoir at Cumwhinton, and a line of 21-inch pipes, hereinafter called service pipes, running from the service reservoir to the city of Carlisle. With the exception of the reservoir at Geltsdale, all these works were comprised in a contract, dated September 9, 1904, entered into between the defendant corporation and William Kennedy, Limited, who were joined as third parties. The

greater part of the works comprised in the contract was within the plaintiffs' district.

On October 20, 1905, the plaintiffs' surveyor certified that extraordinary expenses amounting to 711*l.* 16*s.* 4*d.* had been incurred by the plaintiffs in repairing the several highways in their district therein specified and numbered 1 to 11 by reason of the damage caused by excessive weight and extraordinary traffic thereon, and that such traffic had been conducted by or in consequence of the order of the defendant corporation in carrying out their water scheme; and this action was brought to recover that amount.

The writ in the action was issued on March 13, 1906.

The defendants (among other defences) alleged that the action was not brought within either of the periods prescribed by s. 12, sub-s. 1 (*b*), of the Locomotives Act, 1898 (1), and they paid 300*l.* into Court with a denial of liability.

The action was tried at Carlisle before Channell J. and a special jury in June, 1907.

It appeared that the damage to the roads commenced in September, 1904; that except as to road No. 4 the whole of the damage complained of was done before the end of February, 1905, but that as to road No. 4 a portion of the damage occurred within twelve months of the issue of the writ; that the damage was occasioned by the haulage of materials for the laying of the two lines of pipes, and that no damage to the roads in question in this action was caused by the construction of the service reservoir; that the laying of the service pipes so far as they were within the plaintiffs' district was completed in February, 1905; but that the laying of the intake pipes was not completed until October, 1905, that is to say, within six months of the date of the writ,

(1) Sub-s. 1 of s. 12 of the Locomotives Act, 1898, which amends s. 23 of the Highways and Locomotives (Amendment) Act, 1878, provides, so far as material, as follows:—

"(*b*) Proceedings for the recovery of any expenses incurred after the passing of this Act shall be commenced within twelve months of the time at which the damage has been done, or where the damage is the consequence of any particular building contract, or work extending over a long period, shall be commenced not later than six months after the completion of the contract or work."

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and that the construction of the service reservoir was not completed until after the date of the writ. It further appeared that the only road affected by the laying of the intake pipes was road No. 4.

The jury gave a verdict for the plaintiffs for 450*l.* and apportioned the damages as follows: As to road No. 4, 75*l.*; as to roads 1, 2, 3, 5, and 8, 150*l.*; as to roads 6, 7, 9, 10, and 11, 225*l.*

On July 10, 1907, at Manchester, Channell J. in a considered judgment said that the true effect of the decision of the Court of Appeal in *Lancaster Rural District Council* v. *Fisher and Le Fanu* (1) was that the term "completion of the contract" in s. 12, sub-s. 1 (*b*), of the Locomotives Act, 1898, meant completion so far as it related to work causing the damage giving rise to the action, and, applying that decision to the facts of the present case, he came to the conclusion that so far as the present action was concerned the contract comprised three separate pieces of work—(1.) the laying of the line of pipes from the filter beds to the service reservoir, (2.) the construction of the service reservoir, and (3.) the laying of the line of pipes from the service reservoir to Carlisle. He accordingly held that the plaintiffs were entitled to recover the sum of 75*l.*, but were not entitled to recover the sums of 225*l.* and 150*l.* on the ground that as to these two sums the action was brought more than twelve months after the damage had been done and more than six months after the completion of the work of which the damage was the consequence, and he directed judgment to be entered for the defendants upon the issue of the sufficiency of the sum paid into Court, and ordered 75*l.* to be paid out of Court to the plaintiffs and the balance to the defendants, and he gave the general costs of the action to the defendants.

The plaintiffs appealed from this decision, except as to the 75*l.*, and asked that judgment might be entered for the plaintiffs for 450*l.* in accordance with the findings of the jury.

Langdon, K.C., and *W. Mackenzie*, for the plaintiffs. Under sub-s. 1 (*b*) of s. 12 of the Locomotives Act, 1898, the road

(1) [1907] 2 K. B. 516.

authority must bring their action within twelve months of the date when the damage was done or, where the damage is the consequence of any particular building contract, within six months of the completion of the contract. The latter part of the clause was inserted for the benefit of the road authority, and it has been held that their right of action does not expire until the expiration of the later of the two alternative periods: *Kent County Council* v. *Folkestone Corporation.* (1) It has also been held that "the completion of the contract" means the completion of the actual work to be done under the contract: *Lancaster Rural District Council* v. *Fisher and Le Fanu.* (2) The contract in that case contained a maintenance clause and the decision was that the time began to run from the completion of the work and not from the expiration of the period of maintenance. In this case the plaintiffs' contention is that the contract of September 9, 1904, comprised one system of works and that the date from which the six months must be calculated is the date of the completion of the operative works under the contract. Upon that hypothesis this action is in time as to all the items of damage, inasmuch as the service reservoir was not completed until after the date of the writ. On behalf of the defendants it is contended—and Channell J. has adopted that view—that, because the Master of the Rolls in *Lancaster Rural District Council* v. *Fisher and Le Fanu* (2) said that the completion of the contract meant completion so far as it related to the work causing the damage which gave rise to the action, the works comprised in this contract are not to be treated as one work, but are divisible into sections, and that the time as regards each particular section begins to run from the completion of that piece of work; but the language of the Master of the Rolls must be construed with reference to the subject-matter of the decision, and Channell J.'s view proceeded upon a misapprehension of the effect of that decision.

[FLETCHER MOULTON L.J. All that that case decided was that the term "completion of the contract" meant constructional completion and not contractual completion.]

That sums up the plaintiffs' contention. Further, this is a case

(1) [1905] 1 K. B. 620. (2) [1907] 2 K. B. 516.

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where the damage is the consequence of work extending over a long period within the meaning of the sub-section, and upon that ground also this action is in time. [They also referred to *Bromley Rural District Council* v. *Croydon Corporation*. (1)]

Sanderson, K.C., and *Eustace Hills*, for the defendants and third parties. The primary intention of the Act of 1898 was that the action should be brought within twelve months of the doing of the damage, and the latter part of s. 12, sub-s. 1 (*b*), was introduced merely for the purpose of extending the twelve months for a further period in cases in which that limitation would operate oppressively: *Kent County Council* v. *Folkestone Corporation*, per Vaughan Williams L.J. (2) Under the Act of 1878 the remedy was by summary proceedings, and by Jervis's Act those proceedings were required to be taken within six months of the complaint arising. In *Pool Highway Board* v. *Gunning* (3) the question arose whether the six months ran from the date of the surveyor's certificate or from the time of the demand, and it was held that the period of limitation ran from the date of the certificate. Then in *Whitebread* v. *Sevenoaks Highway Board* (4) proceedings were taken against Mr. Whitebread in respect of expenses ranging over seven years, and it was held that as the proceedings were taken within six months of the date of the certificate the road authority were entitled to recover. That was felt to be such a hardship that this new provision was put into the Act of 1898. That is important as shewing the way in which this sub-section ought to be approached. Bearing in mind the observations of Vaughan Williams L.J., it is submitted, first, that this is not a particular building contract within the sub-section, and, secondly, that, if it is, the time runs from the completion of the contract so far as it relates to the work of which the damage is the consequence, and that it is a question of fact in each case, as was said by Romer L.J. in *Kent County Council* v. *Folkestone Corporation* (2), what that work is. As to the first point, the words "particular building contract" point to a building contract in the ordinary sense of the word; at any rate they do not include a contract, such as a contract for a system of waterworks

(1) [1908] 1 K. B. 353.
(2) [1905] 1 K. B. 620.
(3) (1882) 46 J. P. 708.
(4) [1892] 1 Q. B. 8.

extending over a large area, which may cover any number of works of construction. In *Lancaster Rural District Council* v. *Fisher and Le Fanu* (1) the Court did not decide that the contract was a particular building contract within the sub-section, but held, on the assumption that it was, that the action was out of time. As to the second point, the decision of the Court of Appeal in that case, as shewn by the language both of the Master of the Rolls and of the President, was that the completion of the contract meant the completion of the contract so far as it relates to the work (meaning thereby, no doubt, the work of construction and not the actual haulage) from which the damage results. That is the reasonable construction of the decision and that is the construction which has been again placed upon the decision by Channell J. in *Reigate Rural District Council* v. *Sutton District Water Co.* (2) That construction also gives a reasonable interpretation to the sub-section, for if the term "particular building contract" covers a contract for a vast system of waterworks extending, it may be, over many different districts, it is essential that some further limitation shall be put upon the words "completion of the contract" beyond constructional completion, as it has been called, which involves the completion of the whole of the structural works under the contract, seeing that the particular work from which the damage resulted might form only a small portion of the whole and might lie wholly in one district. Here the laying of the service pipes was one work and the construction of the reservoir was another, but it is shewn that the construction of the reservoir had nothing to do with the damage to the plaintiffs' roads and there was no reasonable possibility that any damage to the roads would accrue therefrom, and consequently there was no ground which would justify the plaintiffs in waiting until the completion of the reservoir before bringing their action. The decision of Channell J. was therefore right.

COZENS-HARDY M.R. This appeal raises a question of importance and perhaps of difficulty under the Locomotives Act,

(1) [1907] 2 K. B. 516.
(2) (1908) 72 J. P. 301; [1908] W. N. 120 (since reversed on appeal, [1909] W. N. 29).

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1898, s. 12, sub-s. 1 (*b*); but before considering the terms of the section I wish to guard myself by saying what in my view this appeal does not raise. First, it does not raise a case in which there are several contracts contained in one document for several independent works. Secondly, it does not raise a case in which there is a building contract involving work causing damage within the plaintiffs' district and also work causing damage without the plaintiffs' district, and all the work within the plaintiffs' district and all the possible damage within the plaintiffs' district have been completed more than six months or more than twelve months before the commencement of the action. Nothing that I propose to say will have any bearing upon or must be considered in any way to prejudice a case of that kind if and when it arises.

The facts of the present case, so far as material, may be shortly stated. A contract was entered into on September 9, 1904, between the contractor and the corporation of Carlisle. It is a written contract the terms of which are for us to construe, and it does seem to me to be quite plainly a particular building contract within s. 12 for one building undertaking the component parts of which are so intimately connected that each part would be useless without the others, just as much as a contract for building a house and also a drain connecting with the sewers is not two separate contracts, but one contract for two connected parts of one work. The contract provided for things to be done within the plaintiffs' district, namely, the construction of a reservoir at Cumwhinton and the laying of a considerable length of pipes originally starting from a place outside that district and ultimately going into Carlisle itself. At the date when the writ in this action was issued that reservoir had not been completed, so that at that date work was actually being done under this contract in the plaintiffs' district which was or might be causing damage to the roads, to use the language of the Legislature, "by excessive weight passing along the same or extraordinary traffic thereon." Work of this kind is, of course, done not in all parts of the district at the same moment; it is done, as convenience may dictate, in one part to-day and in another part to-morrow. A portion of this work which was on the western side of the

plaintiffs' district consisted of laying a long line of pipes (which on this appeal have been called service pipes) in the course of which undoubted damage was caused to the plaintiffs' roads. Those pipes happen to be a part of the building operations which was completed more than six months before the writ in the action was issued. It has been argued, and it was so held by Channell J., that, although the building operations were going on in respect of the reservoir at the date of the writ and in respect of the works to the east of the reservoir within six months of the date of the writ, the actual damage to the particular track of road on the western side was due to haulage more than six months before the issue of the writ, and that so far as that item was concerned the action could not be maintained, and the question we have to decide is whether that is the true effect of the section.

The right to recover expenses for damage caused by the extraordinary traffic is given by the Highways and Locomotives (Amendment) Act, 1878. That Act required the expenses to be recovered by summary proceedings. The Act of 1898 provides that expenses under the prior Act shall cease to be recoverable in a summary manner, and that when the expenses exceed 250*l*., as was the case in this action, they may be recovered in the High Court. Then the section says: "Proceedings for the recovery of any expenses incurred after the passing of this Act shall be commenced within twelve months of the time at which the damage has been done" — that is one limitation—"or"—this is another—"where the damage is the consequence of any particular building contract, or work extending over a long period, shall be commenced not later than six months after the completion of the contract or work." That provision has been construed by the Court of Appeal in three cases to which our attention has been called, but the only case which has any immediate bearing on the present is *Lancaster Rural District Council* v. *Fisher and Le Fanu* (1), which was also a case relating to waterworks. I do not propose to refer to my own judgment in that case, which decided that the term "completion of the contract" does not mean completion so far as the contractual

(1) [1907] 2 K. B. 516.

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obligations between the parties are concerned, but means what in the course of this argument has been called the constructional completion of the contract. The actual decision was that when the work, the building operations, had been in fact completed, and the water was running through the pipes, the period ran from that date, although there was a maintenance clause in the contract which imposed certain obligations upon the contractor for a further period of twelve months. To that extent no doubt there is a necessary limitation upon the words "the completion of the contract." But to say that where there is a contract involving work within the plaintiffs' district, and that work is going on at the date when the action is commenced, and in the course of its progress involves or may involve damage to various roads A, B, C, D, and E within the district, there is to be a separate period of limitation for each one of those roads, is, I think, to fly in the face of the language of the Act. In my view the very object and intent of this section was to provide that in the case of a building contract the local authority are not to be forced to bring as many separate actions, it may be, as they have roads, but are entitled to wait until they see that the whole building contract is completed as far as constructional purposes are concerned, and that that is the date at which the period of six months within which they must take proceedings begins to run. How they are to know while the building contract is going on that more extraordinary traffic may not be conducted over any one of their roads I fail to see. With the greatest respect to Channell J., I base my decision on the view that beyond all doubt this was a building contract which was actually going on at the date of the writ, and that the plaintiff council were entitled to wait until the completion of the building contract, in the sense of constructional operations under that building contract, at least within their own district. The view of the learned judge seems to have been that you must ascertain whether the haulage in any particular road ceased more than twelve months, or in the case of a building contract six months, before the action was brought, and whether there is any reasonable probability of any further extraordinary traffic being conducted over that road. I can find nothing in

the Act to warrant that view. I think it is a fallacy to say that under this sub-section the twelve months is the guiding period. There are two separate and independent periods of limitation, either one of which is to be given effect to to the same extent as the other, and when once the existence of a particular building contract is established the crucial date to be considered is not the date when the haulage caused damage to a particular road, but the date when that particular building contract was completed so far as construction was concerned, and then, and then only, the local authority may sum up all their claims in one action. Therefore I think that the decision of the learned judge was wrong and that this appeal ought to be allowed and judgment entered for the plaintiffs for 450*l*.

FLETCHER MOULTON L.J. I am entirely of the same opinion. Like the Master of the Rolls, I am not going to lay down that the mere fact that certain works are contained in one contract necessarily makes them one work within the meaning of s. 12, sub-s. 1 (*b*), of the Locomotives Act, 1898; nor am I going to deal with a different case which might arise, the case of very extensive contracts ranging over very large areas of ground. I do not think that the section is a difficult one to interpret, but by saying that I do not mean that cases may not arise in which it is difficult to apply the words although they are words easy to construe. This case appears to me upon the facts to be a simple one. The work which the road authority say was not completed until a date sufficiently recent to support this action was the construction of a service reservoir to supply Carlisle with water and the laying of the intake pipes to bring the water to it and of the distributing pipes to take the water from it so far at all events as they were contained within the district of the road authority. I think that that work may fairly be, and must be, taken to be a work within the meaning of s. 12. It is not an unimportant fact that every operation of that work was contained in one contract, but what is more important to my mind is that the various portions of the work are so closely connected that they would naturally be contained in one and the same contract, though of course they would not necessarily be so. Under those circumstances I have no

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hesitation in deciding on the facts of this case that those constructions formed one work. If that be so the case is at an end. The road authority were justified in waiting till the conclusion of the work, when they would know the totality of the damage done by reason of the operations necessary to complete the work, and they might in one and the same action sue for the totality of the damage. It would, I think, be wrong for us to decide this question as though we were merely differing on a point of fact from the learned judge from whose decision this appeal is brought. In my opinion the difference is upon an important question of law. In that decision, but more plainly in the consequent decision which he gave in *Reigate Rural District Council* v. *Sutton District Water Co.* (1), the learned judge shewed that he took the word "work" to mean "operation causing the damage." Now the word "work" is used in two very distinct senses in the English language. We say that the construction of a railway will cause a great deal of work; we also speak of a work of Shakespeare. I think that the difference between this Court and the learned judge as to the meaning of "work" in this section of the Act is nearly as wide as the difference between those two uses of the word. He says in the *Reigate Case* (1) that what is material "is the completion of the work so far as it relates to the work causing the damage," and the substance of his decision is that it is only so long as work is going on from which similar damage may be anticipated that the road authority are relieved from the necessity of bringing their action. That is a fundamental difference between the view of this Court and the view of the learned judge. "Work" used in s. 12 is the construction for which these operations are undertaken; it is not the operations themselves. If we were to decide otherwise we should say that there was an obligation of prevision on the local authority whereby they were to anticipate whether future portions of the work, that is to say, the construction, would be executed by methods which would do damage to their roads or would not. The Act, in my opinion, lays no such unreasonable burden upon them. As long as the work, which is the construction, is unfinished they may wait; but when it has

(1) 72 J. P. 301.

been finished and they can calculate the whole of their damage they are bound not to wait longer than the statutory time before they bring their action. For these reasons I agree with the judgment which has just been delivered by the Master of the Rolls.

BUCKLEY L.J. In this case we are not concerned with the question of difficulty which arose in the *Bromley Case* (1) as to the meaning of the word "work" in s. 12 of the Locomotives Act, 1898. The work here in question comprises the construction of a reservoir with an intake pipe and an outflow pipe—three things, no one of which is of any use without the others. It is a work of construction. Moreover, that work is the subject of a contract, and to my mind plainly a building contract. For a building contract means a contract for the building of anything—not necessarily a house, but any other physical construction. So that here, in my view, the work in question is within both words of this section, "particular building contract or work"; it satisfies both of them. I admit that this section raises many questions of difficulty. Suppose that there was a contract to do works A and B—works of construction. Those two works might be totally independent, the one of the other, as for instance if there be one contract to erect a town hall in the borough and to construct a reservoir five miles away. That is not the sort of case with which we have here to deal. There may be two separate contracts for works A and B on one piece of paper, or the two works A and B may be not two separate contracts on one piece of paper, but component parts of one complete contract. The present, I think, is the latter case. The laying of the intake pipe, the construction of the reservoir, and the laying of the outflow pipe are, it is said, separate works. In a sense they are, but not for the purpose with which we have here to do. They are one work, one composite work, consisting of three parts, each of which is essential for the use, purpose, and existence of the other. I am going now to take the case of a contract to do A and B, component parts of one work, and I am going to suppose that A has been completed and that B has

(1) [1908] 1 K. B 353.

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not. Let us suppose that the completion of B cannot possibly affect the district in question. It may be—I am not going to decide the question, because it does not arise here—that if A and B had been completed as regards A, which alone could affect the particular district, but had not been completed as regards B, which did not affect the district, then the six months period would begin to run. I will assume that that is so without deciding it. If that is so, then it may well be that the work will have been completed in the sense that the work relevant to that particular district will have been completed although the contract will not have been completed. I will assume that the section might so be satisfied. But the case with which we have here to do is that A has not and B has not been so completed as that this particular district will not or may not be affected by extraordinary traffic arising from the contract. The pipes at the west end were completed without the period of six months before the issue of the writ; the pipes at the east end of the district were not completed without that period; the reservoir was not completed until after the issue of the writ; so that the contract, if it be, as I think, one contract, was one which had not been completed before the six months. What is sought to be argued here is that because the operations have been so far completed that it is improbable that there will be any further extraordinary traffic, say, at the west side of the district, although there may be and probably will be more at the east side, it results that the limit of the period of six months has run as regards any damage done at the west, although it has not begun to run as regards damage done at the east. To my mind that is a complete misapprehension of the purpose of this section. The intention of the section is that a district council which has reason to complain of matters of this kind shall not be put to bring more than one action. The twelve months limit has, of course, to do with a state of things which may necessitate a sequence of actions. The object of this other and equally effective provision is that the district council shall not be put to bring more than one action in the cases to which it applies, and so long as the further constructional completion of the contract or work will or may create further

extraordinary traffic or damage or expense within the district I think the district authority is not bound to bring its action, but is entitled to wait until the authority which is executing the contract has completed the work. I may illustrate my meaning thus: I will take the Piccadilly Hotel as a convenient instance with a north-east front to Regent Street and a south front to Piccadilly, two roads which I assume are within the same district. Let us suppose that the whole building operations upon Regent Street have been completed and there is no possible or probable necessity to bring any further materials that way, but that on Piccadilly they have not been completed and that there will be necessity to bring further materials that way. As I understand this section the authority is not bound to bring its action for the injury to Regent Street within six months after Regent Street has ceased to be affected if Piccadilly may be subsequently affected. The intention is that the whole of the injury to the roads occasioned by the building of the Piccadilly Hotel shall be the subject of one action to be brought within six months of the time when the building contract or work shall have been completed. For these reasons I think that the decision in the Court below was wrong and that this appeal ought to be allowed.

Appeal allowed.

Solicitors: *Dixon & Hunt, for H. B. Lonsdale, Carlisle; James & James, for Clutterbuck, Trevenen & Steele, Carlisle.*

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July 20, 21, 22; *Dec.* 9.

[RAILWAY AND CANAL COMMISSION.]

HOLWELL IRON COMPANY, LIMITED *v.* MIDLAND RAILWAY COMPANY.

Railway — Traffic Management — Undue Preference — Special Agreement — Adequate Consideration — Rebate — Traffic served by competing Railways — Claim for Damages — Payment of Rate under protest — Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *s.* 2—*Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25), *s.* 12.

In order to establish a case of undue preference against a railway company the applicants must satisfy the Court that there is something undue, unreasonable, or unfair in the railway company's treatment of the parties under investigation relatively to one another. A mere inequality in charge raises a presumption that this is so; but that presumption may be rebutted. When the inequality is the result of a fair and honest bargain, the consideration for which has been duly executed and enjoyed by the railway company, it is not an undue preference. Such bargains, however, must be looked upon with suspicion, and, in case of such an agreement of modern date, with great suspicion.

The applicants complained that certain traders, the S. Company, whose works were situate at S. on the defendants' main line, and who were rivals in trade of the applicants, were unduly preferred by the defendants in the following respects:—(1.) That the defendants did all the terminal services and provided all the terminal accommodation at the S. Company's works free of charge; (2.) that they hauled all the inward traffic from their main line to the S. Company's works and did the internal shunting at a low fixed charge of 1¼*d.* per ton, and carried the outward traffic from the works to the main line at a fixed charge of 1*d.* per ton, which charges were lower than those laid upon the applicants in respect of their traffic; (3.) that for coal and coke brought to the S. Company's works from certain named collieries a lower mileage rate per ton was charged than in case of coal brought to the applicants' works.

As a justification the defendants pleaded that, being empowered by statute to acquire by compulsion or agreement certain private railways and sidings of the S. Company, they had agreed to purchase the same for a fixed sum of money; that as part of the consideration of the agreement the S. Company agreed to pay at the rate of 1¼*d.* per ton for the carriage of all minerals and other goods traffic from the purchased railways to the S. Company's sidings, and to pay 1*d.* per ton and no more for the working of coal traffic from a certain colliery to the defendants' main line at S.; that all castings and manufactured goods and all materials sent from the S. Company's works were to be carried by the defendants to their main line at S. at the same rate; and that

all goods and materials carried by the defendants for the S. Company were to be delivered into the S. Company's works without any terminal charge for the delivery thereof:—

Held that, as the agreement was bona fide, the consideration above stated, being good and adequate, justified the charges made, and that there was no undue preference.

The applicants also complained of certain rebates allowed by the defendants to rival traders whose works were situate at various stations on the defendants' railway. In these cases the traders performed services in hauling their traffic over their intervening sidings to and from the defendants' railway. They were served by other railway companies in competition with the defendants and having in each case better access to the works of the traders than the defendants had. In order to secure a share of the traffic the defendants were compelled to make the rebates complained of, which were not in excess of a reasonable remuneration for the services performed by the traders:—

Held, following *Phipps* v. *London and North Western Ry. Co.*, [1892] 2 Q. B. 229, that in view of the competition of the other railway companies these rebates were justified.

At other places on the defendants' railway rebates had been allowed to traders in competition with the applicants in respect of services performed by them at their private sidings. The defendants alleged, but failed to prove, that the rates charged to these traders were station to station and not merely station to siding rates. For over two years the applicants had with full knowledge of the facts paid the rate charged to them without claiming any rebate, but stating at the time of payment in every case that payment was made without prejudice to their right to a similar rebate. In an action to recover as damages the amount which they might have claimed as rebate:—

Held, that s. 12 of the Railway and Canal Traffic Act, 1888, which provides that such damages shall not be awarded unless complaint has been made within one year from the discovery by the party aggrieved of the matter complained of, precluded the applicants from recovering.

APPLICATION to the Court of Railway and Canal Commission for relief in respect of alleged undue preferences and for damages under the following circumstances.

The applicants were iron smelters and ironfounders and manufacturers of pig iron and of iron pipes and other articles enumerated in class C of the classification of merchandise traffic in the schedule to the Midland Railway Company (Rates and Charges) Order Confirmation Act, 1891 (54 & 55 Vict. c. ccxix.). Their works were situate at Holwell Junction, near Melton Mowbray, and were connected with the defendants' railway by sidings not belonging to the defendants.

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The applicants were in the habit of sending by railway from their works large quantities of pig iron and of iron pipes and other articles as aforesaid, consigned to the defendants for conveyance to different parts of the United Kingdom. They also received by railway at their works and used there in the process of manufacture large quantities of coal and coke which had been consigned to and carried by the defendants from various collieries and coke ovens situate upon their railway.

In the manufacture and sale of pig iron and of iron pipes and some of the other articles aforesaid the applicants were in active competition with other iron smelters and ironfounders whose works were situate respectively at Staveley and Stanton Gate and connected by sidings with the defendants' railway. They also competed in the manufacture and sale of pig iron with iron smelters whose works were situate respectively at Eckington and Renishaw and Masborough and Park Gate on the defendants' railway.

The defendants also conveyed coal and coke to the works of the applicants' competitors from collieries and coke ovens situate at various places on the defendants' railway, namely, from the Seymour, Ireland, Markham, and Hartington Collieries.

The applicants complained of undue preferences alleged to be given to the Staveley Iron and Coal Company, Limited, by the defendants in the following respects:—(1.) That the defendants did all the terminal services and provided all the terminal accommodation at Staveley free of charge; (2.) that they hauled all the inward traffic from their railway to the Staveley Iron and Coal Company's works and did the internal shunting at a low fixed charge of $1\frac{1}{4}d.$ per ton, a charge which, it was alleged, was much below the cost of the service and much lower than that imposed upon the applicants, and that they carried the outward traffic from the works of the Staveley Iron and Coal Company to their main line at a fixed charge of $1d.$ per ton; (3.) that for the coal and coke brought to the works of the Staveley Iron and Coal Company from the Seymour, Ireland, Markham, and Hartington Collieries a lower mileage rate per ton was charged both absolutely and relatively to distance than for coal brought to the applicants' works from their collieries over a greater

distance; (4.) that these rates, as was admitted, were after the year 1900 increased to the applicants, but not to the Staveley Iron and Coal Company.

As a justification of the matters complained of the defendants relied upon an agreement made on November 29, 1866, between the Staveley Iron and Coal Company and the defendants, the material clauses of which are set out below. At that date the Staveley Company owned certain ironworks situate near to Staveley Station on the defendants' railway between Derby and Leeds; the Staveley Company also possessed three collieries connected with their works by private railways belonging to them and used for purposes of communication between their collieries and their works and between these and the defendants' railway. By a private Act of Parliament passed in the year 1865 (28 & 29 Vict. c. cccxxxv.), s. 31 (1), the defendants were authorized to acquire by compulsion or agreement these private

(1) The Midland Railway (New Lines and Additional Powers) Act, 1865 (28 & 29 Vict. c. cccxxxv.), s. 31: "The company may acquire, by compulsion or agreement, the railways following, and all or any estate or interest in the lands on which the same respectively are constructed, and all stations, works, and conveniences connected therewith; (that is to say,)

"A railway wholly in the township and parish of Staveley in the county of Derby, commencing by a junction with the Midland Railway at or near the Staveley Station of that railway, and terminating at or near the Springwell coalpit, belonging to the Staveley Iron and Coal Company, Limited:

"A railway wholly in the township and parish of Staveley in the county of Derby, commencing by a junction with the Midland Railway at or near the Staveley Station of that railway, and terminating at or near the Speedwell coalpit, belonging to the Staveley Iron and Coal Company, Limited:

"A railway wholly in the township and parish of Staveley in the county of Derby, commencing by a junction with the lastly described railway at or near the Speedwell Junction of the Staveley Iron and Coal Company, Limited, and terminating at or near the Seymour coalpit of the same company:

and the said railways and works, when so acquired by the company, shall, for the purposes of tolls and charges and for all other purposes whatsoever, be part of the undertaking of the company, as if the same had been part of the Midland Railway vested in the company by the before-mentioned Act (local and personal) of the seventh and eighth of Victoria, chapter eighteen."

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railways of the Staveley Company, which, when so acquired, were for the purposes of tolls and charges and for all other purposes to be part of the undertaking of the defendants. In pursuance of this Act the agreement above referred to was entered into, whereby for the considerations therein appearing the Staveley Company (thereinafter called the vendors) covenanted with the defendants and their assigns, and the defendants themselves and their assigns (thereinafter called the purchasers) covenanted with the vendors, as follows, that is to say:—

Article 1. "The vendors agree to sell and the purchasers agree to purchase first All the estate term and interest of the vendors of and in all such and so many of the several pieces of land hereinbefore described as are enclosed and used for the purposes of the several railways and sidings and of and in the several rails chairs sleepers and other accessories thereto belonging situate at Staveley respectively hereinbefore referred to all which railways and sidings are delineated on the plans hereto annexed and are specified in the first schedule hereunder written Secondly All the estate term and interest of the vendors in all such and so many of the several pieces of land hereinbefore described and delineated on the plans hereunto annexed as are specified in the second schedule hereunder written and Thirdly All those locomotive engines and tenders and the fittings machinery and things thereto belonging and which are now worked and used upon the railways sidings and premises hereinbefore mentioned for the purposes of the Staveley Company's businesses which engines are specified in the third schedule hereunder written together with the rights members and appurtenances to the several premises belonging or appertaining," subject to certain ground rents and other sums of money for or in respect of way-leaves or other easements theretofore paid by the vendors.

Article 2. "The consideration money for the purchase shall be 29,788*l.* 14*s.* to be paid by the purchasers to the vendors as hereinafter expressed."

Article 8. "On payment of the purchase-money of 29,788*l.* 14*s.* the vendors will give to the purchasers full and quiet possession of the purchased railway sidings and other roads and ways and other the premises hereinbefore particularly mentioned and will

deliver to them the purchased engines and tenders with the appurtenances and all outgoings down to the day of such payment except where otherwise provided shall be cleared by the vendors."

Article 12. "The purchasers will from time to time do and perform all the locomotive shunting operations upon the several branches and sidings in the parish of Staveley belonging to the vendors and purchasers respectively and will efficiently work the whole of the traffic of or connected with the vendors' businesses in like manner and with the like facilities in all respects as the same has heretofore been performed by the vendors they nevertheless continuing to find and provide horse power to the like extent as they have hitherto done but not further or otherwise."

Article 13. "The purchasers will at their own expense so long as the vendors require continue to work and run the trains hitherto used for conveying colliers both ways between Staveley and Chesterfield including the taking of the colliers to the coal-pits at and for the like charges as have hitherto been paid by the vendors to the purchasers namely the charge of one penny a day for every collier."

Article 14. "The vendors will for the carriage of all minerals or other goods traffic upon the several railways hereby agreed to be purchased (including the new curve provided for by article 11) or upon the vendors' branches or sidings into their works except those of the old Hollinwood Colliery pay to the purchasers at the rate of one penny farthing a ton for every journey, a journey being considered to be from any point on the railways agreed to be purchased to any other point on the railways branches or sidings where the vendors require the materials to be delivered Provided that the purchasers will not at any time charge any higher rate or make any other charge or toll to the vendors for the use of the railways agreed to be purchased than the purchasers from time to time make to other parties sending goods or traffic over those railways."

Article 15. "The vendors will pay to the purchasers one penny a ton and no more for working the coal traffic from the old Hollinwood Colliery to the main line at the Staveley Station and all castings and manufactured goods and all materials sent from

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the Staveley Iron Works shall be carried by the purchasers to their main line at the Staveley Station at the same rate and the vendors will maintain and keep in repair the lines of railway belonging to them in connection with the old Hollinwood Colliery as their property so long as they require the use of those lines of railway."

Article 16. "All goods and materials of all descriptions carried by the purchasers for the vendors shall be delivered into the works of the vendors without any terminal charge whatsoever for the delivery thereof and with the like facilities as such goods and materials have hitherto been delivered."

Article 19. "The several provisions and agreements hereinbefore contained so far as the same relate to the future working of the vendors' traffic upon the lines of railway hereby agreed to be purchased and all rights and privileges tonnage rates and other the conveniences and advantages hereinbefore provided for shall continue and be in force so long as the vendors or their successors carry on the business in which the Staveley Company are now engaged or any business of a similar character and notwithstanding the expiration of the leases or agreements hereinbefore recited or any of them and whether the same or any of them be hereafter renewed or extended or not and on the Staveley Company or their successors ceasing so to carry on business those provisions and agreements shall be void." (1)

The applicants further complained that from the year 1894 down to the present time the defendants had continuously allowed to the applicants' competitors whose works were situate at Eckington and Renishaw a rebate of 2*d.* per ton from the rates on pig iron from those places and a rebate of 1*d.* per ton from the rates on coal and coke to those places; and, further, that the defendants allowed to the applicants' competitors at Masborough and Park Gate a rebate of 1*d.* per ton from the rates on pig iron from those places. It was also alleged that from the year 1898 down to the present time the defendants had continuously allowed to the applicants' competitors whose works were situate at Stanton Gate in respect of coal and coke conveyed by the defendants to Stanton Gate for delivery there to

(1) See note on p. 513, post.

the applicants' competitors the rebates and allowances following, namely, 2*d.* per ton on coal from the Silverhill Colliery, and 1*d.* per ton upon coal from Pleasley Colliery, upon coke from Silverhill Colliery, and upon coal and coke from Butcherwood Colliery.

The defendants pleaded that these were reasonable rebates granted solely by reason of the competition of other railway companies. They further stated that special rates were charged to the Stanton Ironworks Company, Limited, for coal consigned from certain collieries in average daily consignments of not less than one hundred tons, and that the average daily consignments of coal from any colliery to the applicants' works were considerably less than one hundred tons. The facts proved were that at Stanton Gate, Eckington, and Renishaw rebates were allowed to traders in competition with the applicants. In these cases the traders performed services in hauling their traffic over their intervening sidings to and from the defendants' railway. They were served by railway companies which were in competition with the defendants and had in each case better access to the works of the traders than the defendants had. In order to secure a share of the traffic the defendants were compelled to make the rebates complained of, which were not in excess of a reasonable remuneration for the services performed by the traders. Similar rebates were, however, allowed on all the traffic of the traders passing over the defendants' railway, both local traffic and traffic for the carriage of which the other railway companies competed. The applicants had not made arrangements for receiving coal from any particular colliery in average daily consignments of one hundred tons.

With regard to the applicants' competitors at Masborough and Park Gate the rebate of 1*d.* per ton was allowed as alleged. The applicants' rivals at these places provided and performed accommodation and services to a certain extent. The defendants attempted unsuccessfully to prove that the rate charged to these traders was a station to station rate. The rates charged to the applicants had for several years been paid by them under protest, but with full knowledge of the facts.

The applicants lastly complained that although all terminal

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accommodation required for the applicants' traffic, both inward and outward, and all terminal services in connection with such traffic at the Holwell Junction end of the transit were provided and performed by the applicants at and upon their own private sidings at their said works, and although the defendants did not furnish any terminal accommodation or perform any terminal services for or in connection with the applicants' traffic at the Holwell Junction end of the transit, yet the defendants refused to make to the applicants any rebate or allowance from the rates on their traffic in consideration of the provision and performance by the applicants of terminal accommodation and services.

The defendants in answer pleaded that the rates charged to the applicants in respect of their outward and inward traffic were ordinary siding to siding and siding to station or station to siding rates, and contended that the applicants were not entitled to any rebate or allowance in respect thereof.

The applicants proved that they were charged a rate of 8*s.* 4*d.* for the conveyance of iron in lots of four tons from Holwell Junction to London at owners' risk. Since the date of the application they had tendered some traffic for carriage from Holwell to London at the railway company's risk and had been charged a sum of 14*s.* 10*d.* per ton, which included a charge for terminal services. From this they sought to draw the inference that the lower rate of 8*s.* 4*d.* also included a charge for terminal services. They accordingly claimed a rebate or allowance from this rate on the ground that they themselves performed all their own terminal services. The evidence, however, shewed that the rate had been quoted by the defendants as a station to siding and not as a station to station rate.

Balfour Browne, K.C., *Foote*, K.C., and *E. Clements*, for the applicants. First, as to the preference given to the Staveley Iron and Coal Company which the defendants seek to justify by the agreement of November 29, 1866, that agreement contravenes s. 2 of the Railway and Canal Traffic Act, 1854 (1), and

1) The Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), s. 2: "Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic

therefore affords no justification: *Rishton Local Board* v.

upon and from the several railways and canals belonging to or worked by such companies respectively, and for the return of carriages, trucks, boats, and other vehicles, and no such company shall make or give any undue or unreasonable preference or advantage to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever, nor shall any such company subject any particular person or company, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever; and every railway company and canal company and railway and canal company having or working railways or canals which form part of a continuous line of railway or canal or railway and canal communication, or which have the terminus, station, or wharf of the one near the terminus, station, or wharf of the other, shall afford all due and reasonable facilities for receiving and forwarding all the traffic arriving by one of such railways or canals by the other, without any unreasonable delay, and without any such preference or advantage, or prejudice or disadvantage, as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways or canals or railways and canals as a continuous line of communication, and so that all reasonable accommodation may, by means of the railways and canals of the several companies, be at all times afforded to the public in that behalf."

The Railway and Canal Traffic Act, 1888 (51 & 52 Vict. c. 25), s. 11: "Nothing in any agreement, whether made before or after the passing of this Act, which has not been confirmed by Act or by the Board of Trade, or by the commissioners under the Regulation of Railways Act, 1873, or this Act, shall render a company to which this part of this Act applies unable to afford, or shall authorize such company to refuse, such reasonable facilities for traffic as may in the opinion of the commissioners be required in the interests of the public, or shall prevent the commissioners from making or enforcing any order with respect to such facilities."

Sect. 12: "Where the commissioners have jurisdiction to hear and determine any matter, they may, in addition to or in substitution for any other relief, award to any complaining party who is aggrieved such damages as they find him to have sustained; and such award of damages shall be in complete satisfaction of any claim for damages, including repayment of overcharges, which, but for this Act, such party would have had by reason of the matter of complaint.

"Provided that such damages shall not be awarded unless complaint has been made to the commissioners within one year from the discovery by the party aggrieved of the matter complained of. . . . ."

Sect. 27: "(1.) Whenever it is shown that any railway company charge one trader or class of traders, or the traders in any district, lower tolls, rates, or charges for the same or similar merchandise, or lower tolls, rates, or charges for the same or similar services, than they charge to other traders, or classes of traders,

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Lancashire and Yorkshire Ry. Co. (1) In that case, upon a complaint under s. 2 of the Act of 1854 that a railway company did not afford at one of their stations reasonable facilities for receiving and forwarding coal, the company relied as a defence upon an agreement between themselves and the owner of the land on which the station was erected, who had refused to sell the land unless the company agreed not to allow any coal to be received at or sent from the station except such coal as was raised on his estate; it was held that the agreement, though perfectly bona fide, afforded no justification, and that s. 11 of the Railway and Canal Traffic Act, 1888, was passed in order to give the Court jurisdiction to interfere with such agreements. In *Fairweather & Co.* v. *Corporation of York* (2) the defendants to justify a preference relied on an agreement to accept a fixed sum in respect of tolls for the use of a navigation from certain traders who but for the agreement would have transferred their business elsewhere, to the serious injury of the ratepayers of York; it was held that this agreement, though again perfectly bona fide, afforded no justification for the preference. Again, in *Pickering Phipps* v. *London and North Western Ry. Co.* (3), where a railway company agreed to grant a rebate of 4*d.* per ton to certain traders as a consideration for their making a communication with the railway, it was held that that agreement was no

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or to the traders in another district, or make any difference in treatment in respect of any such trader or traders, the burden of proving that such lower charge or difference in treatment does not amount to an undue preference shall lie on the railway company.

"(2.) In deciding whether a lower charge or difference in treatment does or does not amount to an undue preference, the Court having jurisdiction in the matter, or the commissioners, as the case may be, may, so far as they think reasonable, in addition to any other considerations affecting the case, take into consideration whether such lower charge or difference in treatment is necessary for the purpose of securing in the interests of the public the traffic in respect of which it is made, and whether the inequality cannot be removed without unduly reducing the rates charged to the complainant: Provided that no railway company shall make, nor shall the Court, or the commissioners, sanction any difference in the tolls, rates, or charges made for, or any difference in the treatment of, home and foreign merchandise, in respect of the same or similar services."

(1) (1893) 8 Ry. & Ca. Tr. Cas. 74.
(2) (1900) 11 Ry. & Ca. Tr. Cas. 201.
(3) (1892) 8 Ry. & Ca. Tr. Cas. 83.

justification for allowing the rebate to those and refusing it to other traders. The case of *Charrington, Sells, Dale & Co.* v. *Midland Ry. Co.* (1) is to the same effect.

Next, with regard to the rebates allowed to traders at Eckington, Renishaw, Stanton Gate, Masborough, and Park Gate, these rebates are justified on the ground of competition with the Great Central and Great Northern Railways; but competition is no justification for a rebate granted to some traders and withheld from others similarly placed: *Pickering Phipps* v. *London and North Western Ry. Co.* (2); *Charrington, Sells, Dale & Co.* v. *Midland Ry. Co.* (1); and in so far as the rebates are allowed in case of non-competitive traffic the defendants stand unprotected. Further, with regard to traders at Masborough and Park Gate, the rates alleged to be station to station rates are not published as such in the defendants' rate-books as required by s. 14 of the Regulation of Railways Act, 1873. The same rates appear as station to siding rates. If the defendants fail to discharge the onus of proving that these are station to station rates the rebate must be allowed to the applicants by way of damages; s. 12 of the Railway and Canal Traffic Act, 1888; *Pickering Phipps* v. *London and North Western Ry. Co.* (2); *Salt Union* v. *North Staffordshire Ry. Co.* (3); *Vickers, Sons & Maxim* v. *Midland Ry. Co.* (4)

Lastly, as to the rates at Holwell Junction the question is one of fact, whether they are station to station or station to siding rates. The rate of 14*s.* 10*d.* for carriage at owner's risk admittedly is a station to station rate, and the reasonable inference is that the rate of 8*s.* 4*d.* is a station to station rate also.

Sir A. Cripps, K.C., C. A. Russell, K.C., and *H. F. Bidder*, for the defendants. It follows from the case of *Fairweather & Co.* v. *Corporation of York* (5) that a bona fide agreement with one trader may justify an inequality in rates between that trader and another. The fixed annual sum which the corporation agreed to take in lieu of tolls from the preferred traders worked out at 1½*d.* per ton. The tolls charged to the applicants amounted to 6*d.*

(1) (1901) 11 Ry. & Ca. Tr. Cas. 222.
(2) 8 Ry. & Ca. Tr. Cas. 83.
(3) (1898) 10 Ry. & Ca. Tr. Cas. 179.
(4) (1902) 11 Ry. & Ca. Tr. Cas. 249.
(5) 11 Ry. & Ca. Tr. Cas. 201.

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per ton. The Court reduced this latter rate to 3*d.* per ton. According to the contention of the applicants in the present case it was the duty of the Court to reduce that rate to 1½*d.* The Court did not do so, but held that as to the difference between 1½*d.* and 3*d.* the preference was justified by the agreement. That case, therefore, is really in favour of the defendants. The question is whether, in the words of Lord Herschell in *Phipps* v. *London and North Western Ry. Co.* (1), "the circumstances so differ that the difference of charge is in exact conformity with the difference of circumstances." If so, there is no undue preference. The Court must therefore in each case look into the particular agreement and see whether the consideration is adequate. A railway company purchasing land is not bound to pay cash; it may pay by means of a rent-charge or terminable annuity which shall pay off the purchase-money and interest thereon in a number of years; if so, the company may, instead of receiving rates and repaying as capital and interest the amount received, carry the vendor's goods free of charge or at a reduced charge by way of a fair and adequate equivalent for the purchase-money and interest thereon. A bona fide agreement of this nature without any sinister intention may be made between a railway company and their vendors, and none the less where the vendors are traders; and the consideration passing from the company to their vendors, if good and adequate, may be a preference in one sense, but is not an undue preference. In the present case the services rendered by the railway company at a lower rate than is in fact charged to other traders was part of the consideration for the purchase of the railways. The other cases cited by the applicants are distinguishable. In *Pickering Phipps* v. *London and North Western Ry. Co.* (2) the railway was not constructed for the railway company, but remained the private railway of the trader, who might send traffic along it to the company's railway or not, as he pleased. The rebate in that case was, as Wills J. said it was, "a gift" in return for traffic sent along the trader's own railway. In *Rishton Local Board* v. *Lancashire and Yorkshire Ry. Co.* (3) there was a clear attempt

(1) [1892] 2 Q. B. 229, at p. 237. (2) 8 Ry. & Ca. Tr. Cas. 83.
(3) 8 Ry. & Ca. Tr. Cas. 74.

on the part of the vendor, who was a trader in competition with others, to exclude all trade but his own from the station to be built upon the land sold. Within the purview of that agreement there was much more than the compensation or indemnification of the vendor. The inequality of rates in the present case could not be removed without unduly reducing the rate charged to the applicants within s. 27, sub-s. 2, of the Railway and Canal Traffic Act, 1888: *Fairweather & Co.* v. *Corporation of York.* (1)

Secondly, with regard to Eckington, Renishaw, and Stanton Gate, it is clear since the judgment of Lord Herschell in the Court of Appeal in *Phipps* v. *London and North Western Ry. Co.* (2) that competition may justify a railway company in charging unequal rates; that is to say, to those traders for the carriage of whose goods the company competes with rival companies a lower rate may be charged than that which is charged to those other traders of whose goods the company are the sole carriers. The judgment of Wills J. in that case in the Railway and Canal Commission Court (3) is not really to the contrary, and that of Lord Cobham in *Charrington, Sells, Dale & Co.* v. *Midland Ry. Co.* (4) in so far as it is to the contrary must be taken to be overruled.

With regard to Masborough and Park Gate, even assuming that the rate charged is a station to station rate, the applicants have, with full knowledge of the facts, paid the rates claimed for two and a half years, and therefore by s. 12 of the Railway and Canal Traffic Act, 1888 (5), they are precluded from recovering damages in respect of those charges.

With regard to the charges at Holwell Junction both sides agree that the issue to be decided is a question of fact, namely, whether the rates are station to station or station to siding rates. It does not follow from the fact that the rate for carriage at owner's risk (assuming it to be an effective rate) includes terminal services, that therefore the lower rate does the same: *Salt Union* v. *North Staffordshire Ry. Co.* (6)

(1) 11 Ry. & Ca. Tr. Cas. 201.
(2) [1892] 2 Q. B. 229.
(3) 8 Ry. & Ca. Tr. Cas. 83.
(4) 11 Ry. & Ca. Tr. Cas. 222, at p. 235.
(5) See p. 495, ante.
(6) 10 Ry. & Ca. Tr. Cas. 179.

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Balfour Browne, K.C. in reply. It is impossible for the Court to inquire into the adequacy of the consideration of an agreement like that of November 29, 1866; that is an investigation which the Courts of this country have always declined to enter upon.

The rates at Masborough and Park Gate were paid under protest and without prejudice to the right of the applicants to object that they were illegal charges.

Cur. adv. vult.

Dec. 9. The following written judgments were delivered:—

A. T. LAWRENCE J. This is an application by the Holwell Iron Company, Limited, for an order enjoining the defendants to desist from subjecting the applicants to alleged undue prejudices or disadvantages, and claiming damages. The applicants' ironworks are situated at Holwell Junction, near Melton Mowbray, and are connected with the defendants' railway by sidings belonging to the applicants. The haulage to and from the railway company's sidings is done, except in the case of ironstone, by the applicants themselves.

The most important question raised in the case is the allegation that the work done by the railway company for the Staveley Iron and Coal Company constitutes an undue preference of that company and entitles the applicants to be themselves treated upon the same footing as the Staveley Company. The Staveley Company were in the year 1866 the vendors to the defendants of private railways and sidings which formed the means of communication between their two ironworks and three collieries. These railways, about four-and-a-half miles in length, have from that date become an integral portion of the Midland Company's system, and over portions of them their main line passes. By the deed of agreement for the sale the railway company covenant to perform the work theretofore done by the vendors in part gratuitously and in other part at certain specified rates per ton, which rates are very much lower than those charged to other persons; these covenants formed a portion of the consideration for the property sold. The deed was not scheduled to any statute, but the words of the Act authorizing the transaction

were of the widest description, namely, "The company may acquire by compulsion or agreement the railways following." There is nothing in those words to limit the acquisition "by agreement" to a purchase for cash, nor is there anything in the nature of things to make acquisition for considerations including services more hurtful to competitors than acquisition by a purchase for cash. Thus, if the agreement was a fair and reasonable bargain in fact, it must be because the cash consideration for the property was less than the true value of that property. If this difference in value had been measured in cash instead of by means of the covenanted advantages, the railway company would have had to pay an unknown sum x more than it did pay. This sum x would be the capitalized value of the services agreed to be performed. If x were in fact the true value of those services, it would not affect the applicants, for whether the Staveley Company had the services or the money wherewith to pay for them would be immaterial. It is only by assuming either that the value of the services was greater than the value x, or that x, if paid, would have been squandered in unproductive outlay, that it is possible to make any case of preference to the one or prejudice to the other. In this purchase there was no object in covenanting to perform services more valuable than x, for the railway company already had the traffic; what they were acquiring was the internal communications of the vendors' undertaking. If the terms are fair and reasonable the rival trader is in the same position in relation to the vendor. The vendor has either the services or the cash and the interest thereon with which to carry on the trade competition.

Some evidence was given by the applicants to shew that the money portion of the consideration mentioned in the deed was itself equal to the value of the property sold. This evidence was very inconclusive and entirely failed to convince me of the truth of such a view. I can imagine the claim which would have been made for "severance damages," or perhaps even "replacement," if the four-and-a-half miles of railway forming the means of communication between two ironworks and three collieries had been compulsorily taken and no such covenants as we are here considering been possible. This line of attack was

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then abandoned, and Mr. Balfour Browne in his reply did not seek to rely upon it, but assumed for the purposes of this case that the agreement was a fair and bona fide bargain at the time it was entered into. No other evidence was given to suggest that it was not still a fair arrangement.

It was urged, however, that no such agreement could be relied upon in a question of undue preference. I think that such agreements must undoubtedly be viewed with suspicion, and in the case of such an agreement of modern date with great suspicion. But I cannot hold that as a matter of law the payment for railway services or accommodation must take the form of coin of the realm. No question arises in this case under s. 90 of the Railways Clauses Act, 1845. We are concerned only with the undue preference sections of the Railway Acts. In order to make a case under these sections it seems to me that in the result we must be satisfied that there is something undue, unreasonable, or unfair in the railway company's treatment of the parties under investigation relatively to one another. A mere inequality in charge raises a presumption that this is so, but that presumption may be rebutted; here this agreement of purchase explains and accounts for the inequality, and when it is admitted that the inequality is the result of a fair and honest bargain, the consideration for which has been duly conveyed to and is now enjoyed by the railway company, it seems impossible to say that it is also an undue preference. It is further said that this view of the law involves determining the adequacy of the consideration for this agreement, and that such determination is difficult; this is quite true, but in questions of undue preference such matters have always to be determined, and the mere difficulty of doing so in the case of an agreement of sale more than forty years old is no ground for holding that what is admittedly fair and bona fide is also undue or unreasonable. I also think that in considering the difference in treatment of the Staveley Company from that accorded to the applicants we must have regard to the fact that this agreement is binding upon the railway company, and that there is no power to vary its charges for the Staveley traffic. To reduce the rates charged to the applicants and all others in like position would be "unduly

reducing the rates charged to the complainant" within the meaning of the Act of 1888, s. 27, sub-s. 2.

Three cases were relied upon in support of the applicants' contention, and I ought perhaps to say why I think they do not apply here. The first was *Rishton Local Board* v. *Lancashire and Yorkshire Ry. Co.* (1) There the agreement sought to create a monopoly at Rishton and to exclude that station from use by the public for coal and coke, a fundamental violation of the true conception of a railway as a public highway. The next case was *Pickering Phipps* v. *London and North Western Ry. Co.* (2) There no consideration for the rebates passed to the railway company other than the traffic of the freighter—no money, no property, no right; for the traffic could be discontinued at any moment the freighter pleased, and the railway he had constructed remained his own private property, free from any right or interest of the railway company. The trader was not, and as far as I can see never had been, under any obligation either to make the railway or to give any traffic to the company either for any definite period or at all. Under these circumstances the rebate was truly said to be in the eye of the law "a gift." Lastly there is the case of *Fairweather & Co.* v. *Corporation of York.* (3) In this case there were mutual promises by the corporation and by Leethams constituting good legal considerations. The Court did not treat the mere inequality of rates paid by the applicants and Leethams as an undue preference, otherwise they would have suggested the applicants' payment should be reduced to 1½*d.* and not to 3*d.* What they seem to have thought was that the agreement was vicious in that it limited Leethams' payment to 600*l.* no matter how much the traffic increased; 6*d.* per ton for one trader and 1½*d.* per ton for another with no rateable advantage to the corporation was held to be undue in fact. Here the facts are different. The railway company receives a rateable payment, though a low one, and the greater the traffic the greater the benefit to the railway company, for the goods produced must go over portions of their system (other than the four-and-a-half miles included in the agreement)

(1) 8 Ry. & Ca. Tr. Cas. 74. (2) 8 Ry. & Ca. Tr. Cas. 83.
(3) 11 Ry. & Ca. Tr. Cas. 201.

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where it would pay the ordinary rates like those of other persons.

The next matter complained of is certain rebates admittedly granted to the Eckington and Renishaw Company and to the Stanton Gate Company. In these cases the traders are served by competing railway companies, in the one case by the Great Central Railway Company and in the other case by the Great Northern Railway Company. In each case the rival railway company had a better access to the works of the trader than that of the Midland Railway Company. In order to secure a share of the traffic the Midland Railway Company have been compelled to make rebates or allowances from their rates of 2*d.* in some cases and 1*d.* in others. They justify these rebates on the ground that they are rendered necessary by the competition. For the applicants it was contended that competition could afford no justification. It was not seriously contended that the rebate was in excess of the reasonable remuneration for the service performed by the freighter in hauling, &c., his traffic over his intervening private sidings to and from the Midland Railway.

Lastly it was said, and truly said, that the applicants performed similar hauling at Holwell and obtained no rebate. It was urged that the judgment of Wills J. in *Pickering Phipps* v. *London and North Western Ry. Co.* (1) governed this and shewed that no rebate could be justified by competition. I do not so understand that case. The Court was dealing there with both a reduced rate and a rebate. They held the reduced rate justified by the competition. They held the rebate to be "a pure and simple gift." It is clear that, if the reduction in the rate exhausted the requirements of the competition, the rebate was a pure and simple gift; but here there is no reduction of the rate other than the rebate, and it seems to me to be a mere matter of words whether the advantage accorded to the trader due to his having his works served by two competing railways is obtained by way of reduction of the rate or by way of rebate. Inasmuch as I think the rebate is only justified by the competition I think it must be confined to the competitive traffic. It was at the last moment admitted that it was not in fact so

(1) 8 Ry. & Ca. Tr. Cas. 83.

confined. No evidence was given which satisfied me that this was justifiable. Therefore I think that to the extent that rebate was allowed upon non-competitive traffic there has been established an undue preference.

It was further proved by the applicants that rebates of 1*d.* per ton were granted at Masborough and Park Gate. These were sought to be justified by shewing that the rate charged was a station to station rate and not a siding to siding rate, and that the rebate was in respect of the fact that the terminal accommodation and services included in the station to station rate were not being afforded by the railway company. This answer might have been sufficient if it had been clearly established, but the onus was upon the railway company to justify the apparent preference. Now it was shewn that the same rate appeared also in their siding to siding rate-book. This was said to be the result of "wasted energy," but this is not a satisfactory explanation. For when I take into consideration the two rate-books and the fact that there is no mention of the rebate in either, it seems to me that the "energy" has been both wasted and misdirected. I am anxious to decide all questions upon their true merits and not upon technicalities, but this Court cannot allow the provisions of the statutes as to rate-books to become waste paper.

We are asked to award damages in respect of these rebates. But s. 12 of the Act of 1888 is relied upon by the defendants. In answer to this the applicants proved that since 1904 they had paid their rates with a covering letter stating that such payment was made without prejudice to their position. The effect of such a letter is to prevent the payments having any effect as an admission or otherwise adversely to the rights of the person making the payment. But such a letter does not repeal the provisions of the statute. In order to prevent time running under the statute some agreement, express or implied, to waive the statute must be shewn to have been made by the railway company. No evidence of any such waiver was produced. Mr. Foote contended that this letter only referred to some of the applicants' claims and complaints. This is true; but no evidence was given dealing specifically with the date of their discovery of the other matters of complaint. On the other hand

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it was in evidence that Mr. Rose, who had charge of the applicants' railway rates and charges, had been in the Midland Railway Company's rates department for many years before he entered the applicants' service, in which he had been for two-and-a-half years. The applicants are therefore not entitled to damages upon this evidence. If the applicants desired to found a case for damages upon any particular head of claim they should have directed their evidence to shew the time at which that ground of complaint was discovered.

The only other matter insisted upon at the hearing was the alleged refusal of the railway company to charge the applicants such lower rates in respect of consignments of coal or coke, averaging 100 tons per day, as were charged to other freighters, but, as the applicants had never in fact received such consignments from any one colliery, they failed to make any case shewing inequality of treatment in this respect. They did shew that there had been great delay and default on the part of the railway company in quoting them a rate for such 100-ton consignments. This default the railway company should remedy. But no order of this Court is necessary for that purpose, nor is any asked for in the prayer. The other matters alleged in the application were withdrawn.

THE HON. A. E. GATHORNE-HARDY. The most important question in this case, and the one which has raised the most difficulty in my mind, is the question of the bearing of the agreement of 1866 between the defendants and the Staveley Iron and Coal Company upon the question of undue preference. On this, as on the other points, I agree with the conclusions and reasoning of the judgment just delivered, but, having regard to the importance of the point, I desire to add a few words.

The defendants admit that the rates charged to the Staveley Iron and Coal Company for the carriage of coal and merchandise over the portion of their line which prior to the agreement of November, 1866, was the property of the Staveley Company are lower in comparison with those charged to the applicants than can be justified under s. 2 of the Railway and Canal Traffic Act, 1854, apart from that agreement, and that under the same

agreement they perform services for the Staveley Company upon their own premises not rendered to the applicants. I agree with the learned judge that such agreements "must undoubtedly be viewed with suspicion, and in the case of such an agreement of modern date with great suspicion"; but the question we have to decide is whether we are compelled to disregard them altogether in considering a complaint of undue preference, even when we believe them to be bona fide and based upon good consideration. To do so would certainly work injustice and involve consequences of which I should be very reluctant to accept the responsibility. The agreement was made more than forty years ago and has been acted upon ever since, and in construing its provisions we must have regard to the position of the respective parties at the time it was entered into. At that time the Staveley Company was in possession of four-and-a-half miles of line connected with their pits and works, and a quantity of locomotives and tenders with which they performed all the services both of carriage and working on their premises, even conveying colliers to and from their pits at a charge of one penny a day. The defendants, the Midland Railway Company, were desirous of purchasing these railways and lands, some portions of which now form part of their main line, and the acquisition was sanctioned by their Additional Powers Act of July, 1865 (28 & 29 Vict. c. cccxxxv.), in words of the widest description. The vendors stipulated not only for a money payment of 29,788*l.* 14*s.*, but also that the purchasers should take over their locomotives and tenders, make a new junction with their works, perform all the locomotive and shunting operations both within and without the works, convey the colliers at the same charge, and charge for the conveyance of merchandise, coal, and minerals the rates now complained of as a preference; delivering without a terminal charge. From these terms I draw the inference that it was intended that the cost of the services should not exceed the cost to the vendors of performing them up to and at the time of the sale. It does not appear to me that there was anything unreasonable in these stipulations at the time, and that all these various covenants formed part of the consideration for the agreement as well as the consideration

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money mentioned in article 2. If the consideration was adequate there is no preference, and, although it is difficult for us to consider the question of adequacy, the difficulty does not absolve us from undertaking the duty; and in this instance the defendants have satisfied my mind upon the point, my conclusion being in no degree shaken by the evidence by which one witness, Mr. Mills, sought to establish that the pecuniary consideration by itself was a full and proper price for the purchase. If we had to disregard the terms of the agreement, the applicants and all other traders on the line would be really receiving the benefit of considerations they had not given, and it would seem to follow that the defendants would have to perform internal services for every colliery on their line gratuitously, or give an equivalent drawback, and also would have to carry coals and minerals for all traders over all portions of their line at rates calculated upon the basis of those fixed by agreement for carrying over what had been up to the time of the purchase the private lines of the vendor. As to this second point I agree with the learned judge that this would be on the evidence an unreasonable reducing of the rates charged to the complainants within the meaning of s. 27, sub-s. 2, of the Railway and Canal Traffic Act, 1888.

I have little to add to the remainder of the judgment with the conclusions and reasoning of which I agree. I should like to say that all rebates not contained in the rate-book should be looked upon with suspicion. The Legislature intended that traders should be able to ascertain without difficulty the true terms upon which railway companies treat their rivals and competitors in business.

SIR JAMES WOODHOUSE. In this case the applicants are iron smelters and ironfounders, and their works at Holwell Junction, near Melton Mowbray, are connected by private sidings with the main line of the Midland Railway Company, who are the defendants.

The applicants complain that other ironfounders, who are their trade competitors and whose works are respectively on, or connected with, the same railway at Staveley, Stanton Gate,

Eckington, Masborough, and other places, are unduly preferred by the defendants by reason of services rendered and accommodation provided for them free of charge, and which are not so provided for the applicants, or by reason of rebates and allowances made to such competitors and not made to the applicants.

The applicants also complained that they were unduly prejudiced because lower mileage rates relatively to distance were charged to their competitors than to them for goods sent to London and other places south of Holwell Junction; but this part of the case was abandoned.

The first complaint was that no rebate was made to the applicants for the terminal accommodation and services which they themselves provided at their private sidings at Holwell Junction. The applicants, for example, were charged a rate of 8*s.* 4*d.* for the conveyance of iron in four-ton lots from Holwell to London at owners' risk. The defendants' contention was that the rate was not a station to station rate, but a siding to station rate, and included no terminals, and in correspondence of 1903 onwards they had repeatedly stated that the rate was a net rate from which no allowance could be made. The applicants endeavoured to establish that this rate was a station to station rate by shewing that since the application was filed they had sent some traffic at company's risk and been charged the sum of 14*s.* 10*d.* per ton, which it was clear on analysis included terminals. We were asked to infer from this and similar instances that the lower rate at owner's risk must also include a charge for terminals. In view of the margin of difference, namely, 6*s.* 6*d.*, between the two rates, I do not think we are entitled to draw this inference, and, having regard to the nature of the risk, it is not very probable that consignors would avail themselves of the higher rate, which was really, but for the particular instance given, not an effective but a paper rate. I am satisfied upon the evidence that the rate charged was a siding to station rate, and that the claim for rebate thereon is not sustainable.

The next and most important complaint dealt with undue preferences alleged to be given to the Staveley Iron and Coal

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Company, Limited, by reason: (1.) that the defendants did all the terminal services and provided all the terminal accommodation at Staveley free of charge; (2.) that they hauled all the inward traffic from the Midland line to the Staveley Works and did the internal shunting at a low fixed charge of 1¼*d.* per ton, being, as alleged, much below its cost, and much lower than was charged to the applicants, and carried the outward traffic from the works to the main line at a fixed charge of 1*d.* per ton; (3.) that for the coal and coke brought to the Staveley Works from certain collieries, namely, Seymour, Ireland, Markham, and Hartington, a lower mileage rate per ton was charged both absolutely and relatively to distance than in the case of the coal brought to the applicants' works, though the collieries of the applicants were at a much greater distance from their works; (4.) that these rates, as was admitted, were after 1900 increased to the applicants, but not to Staveley.

The defendants justify the matters complained of by reference to an agreement which they entered into with the Staveley Company in 1866. This raises a question of great importance, which has occasioned me anxious consideration, and I have only arrived at a conclusion upon it after considerable hesitation. It appears that in 1866 the Staveley Company owned certain ironworks situate near to the Staveley Station on the Midland Railway from Derby to Leeds; and they also possessed three collieries which were respectively connected with their works by certain private railways belonging to them, and which they used for purposes of communication between their collieries and their ironworks and between these and the Midland Railway. By an Act passed in 1865 (28 & 29 Vict. c. cccxxxv.), s. 31, the Midland Railway Company were authorized to acquire "by compulsion or agreement" these private railways of the Staveley Company, and, when so acquired, they were for the purposes of tolls and charges and for all other purposes to be part of the undertaking of the Midland Railway Company. An agreement was accordingly entered into in November, 1866, whereby the Staveley Company sold to the Midland Railway Company their railways and private sidings with the locomotives used thereon. The consideration money for the purchase was expressed to be the payment of a

sum of 29,788*l.*, and (by article 8) on payment of this amount the Staveley Company were to give to the purchasers full possession of the premises purchased. The agreement also contained a number of collateral stipulations authorizing and requiring the Midland Railway Company to do what is now complained of.

What we have to determine is the effect of such an agreement in view of the enactments against undue preference. First let us look at what is the position of the Staveley Company. They owned four-and-a-half miles of railway which the Midland Railway Company desired and obtained powers to purchase, and in fixing the consideration the Staveley Company would naturally consider what was the value to them of what they were asked to sell. That would be not merely the cost of constructing their railway, but what it was worth to them as a means of dealing with their traffic. They accordingly made a bargain with the Midland Railway Company whereby they secured a payment in cash (which possibly represented the cost of construction) and an obligation on the part of the Midland Railway Company to haul and deal with their traffic on certain fixed and specified terms. They no doubt took into consideration that when the Midland Railway Company had acquired the undertaking their charges for working the traffic would exceed in amount what it had cost the Staveley Company themselves to do the work. Instead of trying to estimate and capitalize the amount which the Staveley Company would save in the present and future in the working of their traffic, the parties appear to have adopted a more accurate method of measuring the value to the Staveley Company of the railway by agreeing that it should depend on the volume of their traffic, and that in respect of every ton of such traffic they should be charged the sums fixed by the agreement instead of the rates and charges which in other circumstances they would be liable to pay. The same pecuniary result would have been obtained had the Staveley Company retained the ownership of the lines and given the Midland Railway Company power to use them on the terms stated in the agreement. We are now asked to say that the charge which the Midland Railway Company make to the Staveley Company for dealing with their traffic over these

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lines is an undue preference. If it is a preference, it is not undue, because the Midland Railway Company must be taken to have received in meal or in malt full payment for the services performed; that is a sum equivalent to the difference between the rates and charges stipulated in the agreement and those which, but for the agreement, they would have been entitled to obtain on the footing of what they charge the applicants. The applicants attempted to impugn the consideration for this agreement by calling a witness to shew that the cash paid was alone sufficient to satisfy the value of what the Midland Railway Company acquired. But this evidence was quite unreliable, and Mr. Balfour Browne abandoned the attempt, and proceeded to argue the case on the assumption that the bargain was a fair and bona fide one. If then, as the learned judge holds, there is no objection in point of law to the railway company making an agreement of this character to pay for what they acquire partly in cash and partly in services, then, on the assumption, which was granted, that this agreement embodied a fair and reasonable bargain in its inception, representing only fair value to the trader for what he gave up, I think it is clear that no undue preference is shewn, and the agreement becomes a justification of the inequality complained of, at all events to the extent of shifting the onus on to the rival trader to establish that in fact the alleged preference is unreasonable. In this case no such evidence has been adduced, and I therefore think the different treatment complained of is justified by the difference of circumstance which the agreement exemplifies. I desire, however, to strongly emphasize what the learned judge has said as to its being the duty of this Court to regard such agreements with the utmost jealousy in order to see that they do not contravene those fundamental principles of equality which should regulate the dealings of a railway company with its customers.

With regard to the rebates complained of as given to the Eckington and Renishaw Company and at Stanton Gate, I agree with the conclusion of the learned judge that the defendants have to the extent to which the traffic is competitive justified these by reason of the competition of the Great Central and Great Northern Railway Companies, and I also agree for the

reasons he has stated that the rebates of 1*d.* per ton granted at Masborough and Park Gate are not justified and cannot be sustained.

Orders accordingly.

Solicitors for applicants: *Neish, Howell & Haldane.*
Solicitors for defendants: *Beale & Co.*

NOTE.—The agreement contained several other articles of which the following is a summary:—

By article 3, if any existing sidings or portions of existing sidings should be upon land acquired by the Midland Railway Company under the powers of their Act and had not been included in the present sale, the Staveley Company were enabled to continue to use such sidings or portions of sidings in connection with the Midland Railway Company's railways as theretofore during the period which, but for the agreement, they could have used the same, paying rent to the Midland Railway Company for the use of the land so occupied after the same rate per acre as was at the date of the agreement paid to the Duke of Devonshire for the same lands, and if any existing sidings or portions of sidings belonging to the Midland Railway Company should be upon land not so acquired the Midland Railway Company were enabled to continue to use the same as theretofore for the period which, but for the agreement, they could have used the same, paying or allowing rent after the like rate for the use of the land so acquired.

By article 4 the Midland Railway Company were empowered from time to time to take up or alter any of the sidings or portions of sidings referred to in the last article on providing other sidings or portions of sidings equally convenient for the use of the Staveley Company.

Articles 5 and 6 dealt with the delivery by the vendors to the purchasers' solicitors of an abstract of title and by the purchasers to the vendors of requisitions on title.

By article 7 the purchasers agreed to bear the expense of examining the title deeds wherever they might be, and of all journeys and agencies for that purpose, and of inquiring for and procuring all information, declarations, certificates, and other evidence not in possession of the vendors.

By article 9 the vendors agreed at their own expense to procure the due apportionment of the rents payable under certain recited indentures and agreements respectively, and the execution by all necessary parties of the transfer or assignment of the premises thereinbefore described, such transfer or assignment to contain proper and sufficient powers and provisions for the indemnification of the purchasers against the rents, covenants, conditions, and obligations reserved and contained in and by the recited indentures and agreements respectively, except only so far as the same were to be paid and borne by the purchasers in accordance with article 1, and to be prepared by the solicitors to and at the expense of the purchasers, and to be executed on or before a day named, on which day the purchase-money was to be paid and possession of the property purchased to be given.

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By article 10 the purchasers agreed to pay half-yearly to the vendors an apportioned surface rent for and in respect of the land over which the railways passed, or which was used for the purposes of or in connection with the railways, and to perform and observe all covenants, conditions, and stipulations contained in the several recited indentures and agreements so far, but so far only, as the same related to the premises agreed to be sold, and also to pay to the several lessors all wayleave rents or the apportioned parts thereof to which the purchased premises or any part thereof should in accordance with articles 1 and 7 be liable as from and after the day named in article 9.

By article 11 the purchasers, for the purpose of improving the passengers' station at Staveley, agreed to provide and lay down rails and all other things necessary to form a new junction and curve of not less than ten chains radius between the Springwell Colliery branch railway belonging to the vendors and the main line of the purchasers southward of the Staveley Station, provided the purchasers were able to purchase or otherwise acquire the land necessary for that purpose, which land was shewn but not numbered on the plan No. 1 annexed to the agreement and thereon coloured red.

By article 17, if and whenever the purchasers should make and lay down any railway siding or other road or way over, across, or under any of the railways, sidings, or other roads or ways from time to time belonging to the vendors, the purchasers agreed to provide and make sufficient gates, signals, and other necessary appliances for the convenient occupation thereof, and so as not to hinder or impede the working of the vendors' railways or other roads or ways, and to make sufficient communication over, under, or across every such railway siding or other road or way so made by them for the use of the vendors and other persons authorized by them to use the same.

By article 18 it was provided that the vendors should have all such means of ingress and egress to and from the several pits for the use of their workmen in going to and returning from their work as they had theretofore had, whether along, across, or over any of the several lines of railway agreed to be purchased or otherwise.

W. H. G.

MABE, APPELLANT *v.* CONNOR, RESPONDENT. 1909 *Jan.* 13.

Copyright—Music—"Pirated Copy of Musical Work"—Perforated Music Roll —Mechanical Instrument—Musical (Summary Proceedings) Copyright Act, 1902 (2 *Edw.* 7, *c.* 15), *ss.* 2, 3.

A perforated music roll, which, when put on a mechanical instrument known as a piano player, produces the notes of a pianoforte accompaniment of a copyright song in much the same way as when the accompaniment is played on a piano with the fingers, is not, upon the authority of *Boosey* v. *Whight*, [1900] 1 Ch. 122, a pirated "copy" of a musical work within the meaning of the Musical (Summary Proceedings) Copyright Act, 1902, so as to authorize proceedings being taken under the Act for the purpose of having the perforated music roll forfeited, destroyed, or otherwise dealt with.

CASE stated by a metropolitan police magistrate.

The respondent was summoned for an offence alleged to have been committed in contravention of the Musical (Summary Proceedings) Copyright Act, 1902.

The appellant was the informant, and the summons alleged as follows: Information has been laid this day by [the appellant] for that you [the respondent] at Broad Court, Bow Street, did offer for sale a pirated copy of a musical work, to wit, one perforated music roll, being a reproduction of the pianoforte accompaniment of a song called "Bandolero," such copy being an infringement of copyright, and that such copy was seized by a constable without warrant on the request in writing of the agent thereto authorized in writing of the apparent owner of the copyright in such work, and that such copy was conveyed by such constable before the Court of summary jurisdiction sitting at Bow Street Police Court, and that such copy is liable to be forfeited or destroyed or otherwise dealt with as the Court may think fit. You are therefore hereby summoned to appear before the Court of summary jurisdiction sitting at Bow Street Police Court to answer to the said information and to shew cause why such copy should not be forfeited, destroyed, or otherwise dealt with as the Court may think fit.

It was proved that the respondent on July 5, 1907, offered for sale in Broad Court, Bow Street, a perforated music roll capable

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of reproducing the notes of a pianoforte accompaniment of a song called "Bandolero." The appellant was present and, being himself authorized for that purpose in writing by the owners of the copyright of the song, authorized a constable to seize the perforated music roll. The roll was seized by a constable and brought before a metropolitan police magistrate sitting in Court. The song was the subject of an existing copyright, and Messrs. Chappell & Co., Limited, were the owners of the copyright of the song. The perforated music roll, when put on an instrument called a Cecilian piano player, produced the music of the song in much the same way as when it was played on a piano in the ordinary way with the fingers.

It was contended on behalf of the appellant that the perforated music roll was a pirated copy of a musical work within the meaning of the Musical (Summary Proceedings) Copyright Act, 1902 (1), and as such liable to be forfeited or destroyed or otherwise dealt with as the Court might think fit under the provisions of the Act, and in support of that contention the definitions in s. 3 of that Act and in s. 3 of the Musical Copyright Act, 1906 (6 Edw. 7, c. 36), were referred to.

(1) Musical (Summary Proceedings) Copyright Act, 1902 (2 Edw. 7, c. 15), s. 2: "If any person shall hawk, carry about, sell, or offer for sale any pirated copy of any musical work, every such pirated copy may be seized by any constable without warrant, on the request in writing of the apparent owner of the copyright in such work, or of his agent thereto authorized in writing, and at the risk of such owner.

"On seizure of any such copies, they shall be conveyed by such constable before a Court of summary jurisdiction, and, on proof that they are infringements of copyright, shall be forfeited, or destroyed, or otherwise dealt with, as the Court may think fit."

Sect. 3: "'Musical copyright' means the exclusive right of the owner of such copyright, under the Copyright Acts in force for the time being, to do or to authorize another person to do all or any of the following things in respect of a musical work:—(1.) To make copies by writing or otherwise of such musical work; (2.) to abridge such musical work; (3.) to make any new adaptation, arrangement, or setting of such musical work, or of the melody thereof, in any notation or system.

"'Musical work' means any combination of melody and harmony, or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced.

"'Pirated musical work' means any musical work written, printed, or otherwise reproduced, without the consent lawfully given by the owner of the copyright in such musical work."

It was contended on behalf of the respondent that the perforated music roll was not a pirated copy of a musical work within the meaning of the Act of 1902, and in support of this contention the case of *Boosey* v. *Whight* (1) was mainly relied on.

The magistrate dismissed the summons. (2)

The question for the opinion of the Court was whether the

(1) [1899] 1 Ch. 836; [1900] 1 Ch. 122.

(2) The chief magistrate (Sir Albert de Rutzen), who heard the case, delivered a considered judgment, in which he said: It does not appear to me to be necessary to go behind the case of *Boosey* v. *Whight*, [1899] 1 Ch. 836; [1900] 1 Ch. 122, which was decided under the Copyright Act, 1842, upon precisely similar facts to those now before me. The case first came before Stirling J., and was afterwards taken to the Court of Appeal, where Lindley M.R., after hearing the arguments, said that it was a case of such novelty and importance that they would take time to consider it; and in the result they held, affirming the decision of Stirling J., upon the main point, that the rolls, so far as they contained perforations, were part of the organ, and were not copies of sheets of music within the Copyright Act, 1842. If nothing had happened since 1900, I should of course be bound by that case, but in 1902 an Act was passed to amend the law relating to musical copyright. It is under this Act that the present summons has been taken out, raising the same question as was decided in *Boosey* v. *Whight*, [1899] 1 Ch. 836; [1900] 1 Ch. 122, and counsel for the appellant contends that the words in the Act of 1902 say in effect that a perforated roll such as the one discussed in *Boosey* v. *Whight*, [1899] 1 Ch. 836; [1900] 1 Ch. 122, shall be an infringement of copyright. We all remember that prior to the Act of 1902 it was quite common to see perhaps half a dozen men standing in the gutter selling music, and numerous cases were brought before the Courts for the purpose of stopping this, and the Act did so. But the question is, Do the words in the Act shew that the appellant's contention is right, and that perforated rolls are now made an infringement of the Act in respect of which a summary order can be made? Counsel for the appellant relies upon the third clause of the definition of "musical copyright" in s. 3 of the Act, "to make any new adaptation, arrangement, or setting of such musical work . . . . in any notation or system." I have looked most carefully in all the dictionaries I could, and I find this in addition to the ordinary use and meaning of the word "adaptation," "the process of adapting to new conditions, as the adaptation of a musical composition." I find nothing in the definition upon which the appellant's counsel relies to lead me to suppose that the Legislature, in so defining musical copyright, intended these words, which in their ordinary and unstrained interpretation seem to me to apply to written or printed copies of musical works, to cover these perforated rolls, which only two years before had been declared by the Court of Appeal to

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perforated music roll was a pirated copy of a musical work within the meaning of the Musical (Summary Proceedings) Copyright Act, 1902.

Danckwerts, K.C. (*R. D. Muir* with him), for the appellant. The Court of Appeal decided in *Boosey* v. *Whight* (1) that a perforated music roll, similar to the one in this case, was a part of the mechanism of the instrument, and was not a "copy" of a sheet of music within the Copyright Act, 1842 (5 & 6 Vict. c. 45). Sect. 2 of that Act defines the word "book" as including a sheet of music, and the word "copyright" as meaning "the sole and exclusive liberty of printing or otherwise multiplying copies of any subject to which the said word is herein applied." Sect. 3 defines the duration of copyright in every book, and s. 15 gives a remedy for an infringement of that right, but that section does not limit the right given by ss. 2 and 3: *Novello* v. *Sudlow*. (2) Under that Act copyright only extends to "printing or otherwise multiplying copies" of the book. *Boosey* v. *Whight* (1) did not decide that a perforated music roll could not be a sheet of music within the Act of 1842; it only decided that the roll was not a "copy" of a sheet of music within the Act. It had before that date been held that a musical composition was a writing within 8 Anne, c. 19: *Bach* v. *Longman* (3):

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be parts of the musical instrument and not copies within the meaning of the Act of 1842. If this had been the intention of the Legislature, I cannot but think that the framers of the Act, who were careful to point out what the words "musical copyright" were to mean and include, would have been no less careful to explain that the term was to mean and include something which would not, in my opinion, fall under the ordinary and unstrained acceptation of the words used. I am confirmed in this view by the next term which is defined in s. 3, namely, "musical work" means "any combination of melody and harmony, or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced." It is to be noticed that in the Act of 1906 the Legislature clearly says that the pirated copies and plates are not to include perforated rolls. Under these circumstances, I am of opinion that this summons must be dismissed; but as this is a test case, I shall be ready to grant a case for the King's Bench Division, if asked; and I shall not be at all sorry if it turns out that my decision is wrong.

(1) [1900] 1 Ch. 122.
(2) (1852) 12 C. B. 177.
(3) (1777) 2 Cowp. 623.

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and it was also held that to publish in the form of quadrilles and waltzes the airs of an opera, of which there existed an exclusive copyright, was an act of piracy: *D'Almaine* v. *Boosey*. (1) In this latter case the Lord Chief Baron said (2): "Substantially the piracy is where the appropriated music, though adapted to a different purpose from that of the original, may still be recognized by the ear." In that state of the law the Musical (Summary Proceedings) Copyright Act, 1902, was passed "to amend the law relating to musical copyright," and its object was to give greater protection to the owners of copyright in musical works. Sect. 1 gives a Court of summary jurisdiction power, upon the application of the owner of the copyright in any musical work, if satisfied that there is reasonable ground for believing that pirated copies of such musical work are being hawked, carried about, sold, or offered for sale, to authorize a constable to seize the copies, and the Court may order them to be destroyed or delivered up to the owner of the copyright, on proof that they are pirated. Sect. 2 gives a constable power, on the request in writing of the apparent owner of the copyright in a musical work, where a pirated copy of the musical work is being hawked, carried about, sold, or offered for sale, to seize such copy, and the Court may order it to be forfeited or destroyed or otherwise dealt with. Sect. 3 defines "musical copyright" as "the exclusive right of the owner of such copyright, under the Copyright Acts in force for the time being, to do or to authorize another person to do" certain things, among others, "to make any new adaptation, arrangement, or setting of such musical work, or of the melody thereof, in any notation or system." Therefore it is within the exclusive right of the owner of the copyright in a musical work to make a new adaptation of that work. This perforated music roll is an "adaptation" of a musical work. "Musical work" is defined in the section to mean "any combination of melody and harmony, or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced." Reading that definition into the definition in s. 3 of "pirated musical work," this latter definition reads thus: "Pirated musical work" means "any

(1) (1835) 1 Y. & C. Ex. 288. (2) Ibid. p. 302.

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combination of melody and harmony, or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced, (which is) written, printed, or otherwise reproduced, without the consent lawfully given by the owner of the copyright in such musical work." The words "otherwise reproduced" are perfectly general, the word "graphically" being omitted, and mean reproduced in any way, even though not printed or written, and whether reproduced graphically or not. This perforated roll is therefore a reproduction of a musical work. The definition of "pirated musical work" must be read into ss. 1 and 2 of the Act, and when that is done it becomes clear that this perforated roll comes within those sections.

The Act of 1902 has therefore given a more extended meaning to the word copyright and has given the owner of the copyright additional remedies. This view is strengthened by the Musical Copyright Act, 1906 (6 Edw. 7, c. 36), s. 3 of which, after defining "pirated copies" in words similar to those in the definition of "pirated musical work" in s. 3 of the Act of 1902, goes on to provide that the expression "pirated copies" shall not, for the purposes of the Act, be deemed to include perforated music rolls used for playing mechanical instruments. This shews that, but for that express provision, these rolls would be included in the term "pirated copies." They therefore come within the definition of "pirated musical work" in the Act of 1902. The perforated roll performs a somewhat similar function to that performed by a sheet of music. The latter instructs the fingers, through the medium of the brain and eye, to strike the particular notes; the former instructs the mechanism of the instrument as to the notes by means of holes in the roll. The decision of the magistrate was therefore wrong.

[He also referred to *Macmillan & Co.* v. *Dent.* (1)]

Scrutton, K.C. (*G. Elliott* with him), for the respondent. The decision of the Court of Appeal in *Boosey* v. *Whight* (2) concludes the present case. This perforated roll, even if it be a "musical work" within the Musical (Summary Proceedings) Copyright Act, 1902, is not a "copy" of a musical work within s. 1 or s. 2 of that Act. The Copyright Act, 1842, conferred two rights—first,

(1) [1907] 1 Ch. 107. (2) [1900] 1 Ch. 122.

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by s. 3, the copyright in, that is the right of multiplying copies of, a book, which by s. 2 includes a sheet of music. This right existed before that Act, though in a less extended form. The second right conferred is, by s. 20, the sole right of representing or performing a musical composition in public. The Act prohibited not merely the sale of copies of the book, but also a gratuitous distribution of copies: *Novello* v. *Sudlow*. (1) An abridgment or an arrangement for the pianoforte from a copyright opera may be an infringement: *D'Almaine* v. *Boosey* (2); *Wood* v. *Boosey*. (3) From 1842 onwards the musical box and the barrel organ were two well-known means of producing musical sounds, and no one has ever suggested that the cylinder of the musical box or the mechanism of the organ is a "copy" of a sheet of music. In *Boosey* v. *Whight* (4) an attempt was made to bring a perforated roll of music used in a mechanical organ within the prohibition of the Act, but the Court of Appeal held that it was not a "copy" of a sheet of music, but that it was a part of the mechanism which produced the sound. Therefore this perforated roll is not a "copy" of a sheet of music within the Act of 1842. The Musical (Summary Proceedings) Copyright Act, 1902, has not altered the law in this respect. The words "otherwise reproduced" in the definition in s. 3 of a "pirated musical work" have the same meaning as the words "otherwise multiplying" in s. 2 of the Act of 1842. Moreover, a definition clause can only alter the law when the expression defined is introduced into the substantive enactment. In s. 3 of the Act of 1902 three expressions are defined, namely, "musical copyright," "musical work," and "pirated musical work," and of these only one, "musical work," appears in the substantive enactment in ss. 1 and 2. The expression used in s. 1 is "pirated copies of such musical work," and in s. 2 "pirated copy of any musical work." There must still be a "copy" of a musical work. This perforated music roll, which like the roll in *Boosey* v. *Whight* (4) can possibly be read by a specially skilled person, is not a "copy" of a musical work. It is part of the mechanism of the instrument. The definition of "musical

(1) 12 C. B. 177.
(2) 1 Y. & C. Ex. 288.
(3) (1868) L. R. 3 Q. B. 223.
(4) [1900] 1 Ch. 122.

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copyright" is merely a restatement of the old law on the subject, the words of clause 3, "in any notation or system," being used to include the case of a blind alphabet and such like things. With regard to the Musical Copyright Act, 1906, the definition in s. 3 of "pirated copies," namely, "any copies of any musical work written, printed, or otherwise reproduced" without the consent of the owner, are in effect the same as "printing or otherwise multiplying copies" in s. 2 of the Act of 1842. The Act of 1906 includes within its scope plates used for the purpose of printing or reproducing pirated copies of a musical work, and it then goes on to say that the expressions "pirated copies" and "plates" shall not be deemed to include perforated music rolls used for playing mechanical instruments. No inference can be drawn from that Act that these perforated music rolls are pirated copies of a musical work within ss. 1 and 2 of the Act of 1902. The object of the Act of 1902 was to give a summary remedy to the owners of copyright in a musical work for piracy, but not to extend the copyright, and the object of the Act of 1906 was simply to make the remedy more effective where it had been found defective. The Legislature passed the Act of 1902 with full knowledge of the decision in *Boosey* v. *Whight* (1), and if it had been intended to alter the law as there laid down and to make such an extension of copyright as is contended for by the appellant, express words would have been used making these perforated rolls "copies" of the musical work. The magistrate was therefore right in dismissing the summons.

Danckwerts, *K.C.*, in reply. The words "otherwise reproduced" in the definition of "pirated musical work" in s. 3 of the Act of 1902 are wider than the words "otherwise multiplying copies" in s. 2 of the Act of 1842. A gramophone might reproduce the music, but it could not be said to multiply copies.

LORD ALVERSTONE C.J. It is satisfactory to know that the proceeding before the magistrate was not of the nature of a criminal matter, and that accordingly an appeal will lie to a higher tribunal. I say this because in our opinion the decision

(1) [1900] 1 Ch. 122.

of the Court of Appeal in *Boosey* v. *Whight* (1) covers this case, and by that decision we are bound.

I have come to the conclusion that the decision of the learned chief magistrate is right, and I wish to adopt as my own the reasons given by him for his decision. At the same time I will state in my own words my reasons for thinking that the present case falls within the decision in *Boosey* v. *Whight* (1), and that if a distinction is to be drawn between that case and the present one, it must be drawn by the Court of Appeal or by the House of Lords. The summons in the present case was taken out under s. 2 of the Musical (Summary Proceedings) Copyright Act, 1902, for the purpose of obtaining an order that the perforated music roll which had been seized by a constable should be forfeited or destroyed or otherwise dealt with. The real difficulty arises from this legislation being of a somewhat piecemeal character, and in construing the Act we must take into account the development of the legislation as a whole upon the subject of copyright. It is not disputed by counsel for the appellant that, if he is right in his contention, the Act has, by making a perforated music roll an infringement of the copyright in the musical work, increased very considerably the rights of the owners of the copyright therein, with the result that the extensive powers of seizure and forfeiture conferred by ss. 1 and 2 of the Act become applicable. Considering how largely used these perforated music rolls are, there can be no doubt that the appellant's contention involves a very great extension of copyright.

The Act of 1902 was passed about two years after the decision of the Court of Appeal in *Boosey* v. *Whight* (1), and it must be taken that the Legislature, when they passed that Act, knew that these perforated music rolls had been held not to be copies of a sheet of music within the Copyright Act, 1842. In those circumstances the Act of 1902 was passed. Sect. 1 provides that "a Court of summary jurisdiction, upon the application of the owner of the copyright in any musical work, may act as follows: If satisfied by evidence that there is reasonable ground for believing that pirated copies of such musical

(1) [1900] 1 Ch. 122.

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work are being hawked, carried about, sold, or offered for sale, may by order authorize a constable to seize such copies without warrant and to bring them before the Court, and the Court, on proof that the copies are pirated, may order them to be destroyed, or to be delivered up to the owner of the copyright if he makes application for that delivery." Sect. 2 gives the owner of the copyright power to act himself without the intervention of a Court of summary jurisdiction; it provides that "if any person shall hawk, carry about, sell, or offer for sale any pirated copy of any musical work, every such pirated copy may be seized by any constable without warrant on the request in writing of the apparent owner of the copyright in such work, or of his agent thereto authorized in writing, and at the risk of such owner. On seizure of any such copies, they shall be conveyed by such constable before a Court of summary jurisdiction, and on proof that they are infringements of copyright shall be forfeited or destroyed or otherwise dealt with, as the Court may think fit." Therefore in order to give the Court of summary jurisdiction power to deal with the matter it must be shewn that that which has been seized is a pirated "copy" of a musical work. I may at this stage refer to the observations of Stirling J. in *Boosey* v. *Whight* (1) when dealing with a similar perforated music roll under the Copyright Act, 1842. He said: "The contention of the plaintiffs is that the rolls are copies of a substantial part of what is found in the sheets published by them, though expressed in a somewhat unusual and difficult form of notation, and consequently that the sole and exclusive liberty of multiplying copies is infringed." He then states the contention on the other side, and after stating that he agrees with it, and that the copyright conferred by the Act of 1842 is the exclusive liberty of multiplying copies of something in the nature of a book, he says: "The rolls, so far as they contain perforations, are in fact used simply as parts of a machine for the production of musical sounds, not for the purpose of a book. They are used as a means of appealing to the mind directly through the ear; not, as in the case of a book, through the eye of an ordinary reader, or through the sense of touch in the case of a blind person." It cannot be

(1) [1899] 1 Ch. 836, at p. 842.

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denied that, leaving out of account for the moment the definitions in s. 3 of the Act of 1902, the question raised in the present case is completely covered by the decision of Stirling J., and that this perforated music roll is not a pirated "copy" of a musical work. When that case was in the Court of Appeal Lindley M.R. said (1): "It may be true that the manufacture and sale of the perforated sheets diminish the sale of the plaintiffs' sheets of music." One must remember that the argument in the Court of Appeal was the same as in the Court below, namely, that "the perforated sheets of which the plaintiffs complain as infringing their copyright are sheets of music within the Copyright Act, 1842." Lindley M.R. proceeded: "But it does not follow that the plaintiffs' copyright has been infringed; and I am of opinion that it has not. I regard the defendants' perforated sheets as part of a mechanical contrivance for producing musical notes; and I cannot think that manufacturers of musical instruments infringe any person's copyright by so constructing their machines and appliances to be used with them as to produce musical notes indicated on a sheet of music. On this broad and very important question, which so far as I know has never been raised before in this country, I am of opinion that the decision of Stirling J. is correct." Romer L.J. in the same case said (2): "The sheets which are said to be copies of the plaintiffs' published sheets of music were issued only for the purpose of being used as parts of a mechanical musical instrument to produce musical sounds. And, as a matter of substance, the defendants' sheets have in fact only been used by those to whom they were issued for the sole purpose for which they were in fact issued. But it is said that they could be issued so as to answer the same purpose as copies of the plaintiffs' printed music, and that therefore they ought to be regarded as 'copies' within the Act. To my mind it does not of necessity follow that, because a thing might be so used as to answer the same purpose as a copy of a book, it must be regarded as a 'copy' within the Act." I understand that to be a distinct decision that these perforated music rolls are not "copies" of a sheet of music within the Act of 1842. It follows to my mind

(1) [1900] 1 Ch. 122, at p. 124. (2) [1900] 1 Ch. at p. 126.

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that we must hold that they are not pirated "copies" of a musical work within the Act of 1902, unless we are compelled by the definition clause in that Act to give a wider meaning to the words. The first definition in s. 3 is that of "musical copyright." I agree with the counsel for the respondent that that definition merely sums up the law as it stood before the Act. I need not, therefore, refer more particularly to that definition. The next definition is that of "musical work." Not much reliance is placed upon that definition on behalf of the appellant, because it is not denied that the words "or otherwise graphically produced or reproduced" mean a production or reproduction in the nature of printing or writing. Reliance, however, is mainly placed upon the last definition, namely, that of "pirated musical work," which is defined to mean "any musical work written, printed, or otherwise reproduced, without the consent lawfully given by the owner of the copyright in such musical work." It is said that the words "otherwise reproduced" are perfectly general and include a reproduction however contrived, and that the definition must be read into ss. 1 and 2 of the Act. But the words in ss. 1 and 2 are not pirated musical work, but pirated "copies," and pirated "copy," of a musical work; and in my judgment the definition of "pirated musical work" in s. 3 does not in any way alter or enlarge the meaning of the words "pirated copy" of a musical work. The definition may, perhaps, though I doubt it, somewhat enlarge the ordinary meaning of pirated musical work; but it has no bearing on the word "copies" or "copy" of a musical work in ss. 1 and 2 respectively, nor does it in the slightest degree impeach or render inapplicable the construction placed upon the word "copies" in s. 2 of the Copyright Act, 1842. The appellant, however, in further support of his contention, relies upon the provision in s. 3 of the Musical Copyright Act, 1906, which, after defining the expression "pirated copies" as meaning in that Act "any copies of any musical work written, printed, or otherwise reproduced without the consent lawfully given by the owner of the copyright in such musical work," and after defining the expression "plates," enacts that "the expressions 'pirated copies' and 'plates' shall not, for the purposes of this Act, be deemed

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to include perforated music rolls used for playing mechanical instruments." The argument is that but for that express exclusion the expression "pirated copies" of a musical work would include these perforated music rolls, and that that shews that the Legislature recognized that they were included in the words "pirated copies" in the Act of 1902. But the answer seems to me to be that those words excluding perforated music rolls from the definition of "pirated copies" were inserted in the Act of 1906 ex abundanti cautela, and it affords no ground for holding that the Act of 1902 includes them. One must remember what gave rise to the legislation of 1906. It had been held (1) that, when pirated copies of a musical work had been seized under s. 2 of the Act of 1902, the Court of summary jurisdiction before which they were taken had no power to order them to be forfeited, destroyed, or otherwise dealt with, unless the persons from whom they had been seized were served, by means of a summons, with notice of the intention to apply for such an order. As those persons' names and addresses could not generally be ascertained, the Act was rendered nugatory, and the police courts became filled with copies of musical pieces which had been seized but which could not be disposed of, and the Act of 1906 was passed for the purpose of remedying that and other defects in the Act of 1902. In view of the drastic nature of the remedies given by the Act of 1906, and of the offences created by it, the Legislature may well have thought it desirable, for the protection of the person charged with selling or having in his possession for sale pirated copies of a musical work, and for the purpose of leaving the matter in no doubt at all, to insert a provision that "pirated copies" shall not, for the purposes of that Act, be deemed to include perforated music rolls. I fail to see how it can properly be inferred from that which I may without disrespect call an excess of caution on the part of the Legislature that a perforated music roll is a pirated copy of a musical work within the Act of 1902. The question therefore depends simply upon the true construction of the words "pirated copy of any musical work" in s. 2 of the Act of 1902, and, that being so, we are bound by the decision in

(1) See *Ex parte Francis*, [1903] 1 K. B. 275.

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Boosey v. *Whight* (1) to hold that this perforated music roll is not a "copy" of a musical work within the meaning of the Act. The appeal must therefore be dismissed.

BIGHAM J. I agree. The original song in this case, which is a "musical work" within the Musical (Summary Proceedings) Copyright Act, 1902, is the subject of musical copyright, and that copyright is vested in Chappell & Co. The only question before us is whether this perforated music roll is a pirated copy of that musical work within s. 2 of the Act. I am by no means satisfied in my own mind that it is not. It seems to me that it may be said that it is a reproduction of the song within the definition of "pirated musical work" in s. 3. But whatever my own opinion may be, I am clearly of opinion that the decision in *Boosey* v. *Whight* (1) precludes us from holding that it is a copy of the musical work. That case was decided before the Act of 1902 was passed, but the arguments put before the Court and the reasoning of the judgments in that case seem to me to be just as applicable now as when that case was decided. For the reasons given by my Lord I am also of opinion that the question is not affected by the Musical Copyright Act, 1906.

WALTON J. I agree. I understand *Boosey* v. *Whight* (1) to have decided this: that perforated music rolls, similar to the one in the present case, though they might be used by specially skilled persons as sheets of music or for the purpose of making copies of the original sheet of music, are not "copies" of a sheet of music within the Copyright Act, 1842, but merely mechanical contrivances to produce the notes of the music. That case, however, was decided before the Musical (Summary Proceedings) Copyright Act, 1902, was passed, and the argument in the present case turns upon the proper construction of that Act. As I understand the argument advanced on the part of the appellant, it is this. By s. 3 "pirated musical work" is defined to mean "any musical work written, printed, or otherwise reproduced, without the consent lawfully given by the owner of the copyright in such musical work." It is contended that the

(1) [1900] 1 Ch. 122.

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words "otherwise reproduced," being perfectly general, mean reproduction, not merely by a copy, but in any other way, and therefore include reproduction by means of a mechanical contrivance of the notes of the music on a piano. The argument depends to a large extent upon the contrast between the definitions in s. 3 of "musical work" and of "pirated musical work." The definition of musical work is "any combination of melody and harmony, or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced." It is conceded that the original musical work to which copyright attaches must be a work printed, or reduced to writing, or written out in some way. It is pointed out, however, that in the definition of "pirated musical work" the word "graphically" is omitted, and that the words are simply "otherwise reproduced." Substituting for the expression "musical work," where it appears in the definition of pirated musical work, the above definition of the expression, we have "pirated musical work" defined as meaning "any combination of melody and harmony, or either of them, printed, reduced to writing, or otherwise graphically produced or reproduced, (which is) written, printed, or otherwise reproduced, without the consent lawfully given by the owner of the copyright in such musical work." It is contended that that is wide enough to cover the reproduction by means of a mechanical contrivance. In my opinion the word "reproduced" means a reproduction in the nature of a copy either in print, or in writing, or in some graphic form. I do not think that the Act of 1902 has made any difference in the law in this respect, and this case therefore comes within the decision in *Boosey* v. *Whight* (1), by which we are bound. The appeal must therefore be dismissed.

Appeal dismissed.

Solicitor for appellant: *H. Percy Becher.*
Solicitors for respondent: *Maples, Teesdale & Co.*

(1) [1900] 1 Ch. 122.

W. F. B.

K. B. D.
1908
May 2, 22.
C. A.
1909
Jan. 14.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

COLDRICK *v.* PARTRIDGE, JONES & CO., LIMITED.

Master and Servant—Common Employment—Risk incidental to Employment—Negligence of Fellow Servants—Implied Term of Contract of Service—Accident to Workman while leaving Employers' Premises after Conclusion of Day's Work.

Where colliery proprietors, who possessed a railway in connection with their colliery, were accustomed voluntarily to run a train thereon for the carriage of their colliers, free of charge, from the colliery towards the place where they lived, after their day's work was done, and a collier in their employ, while being so carried, met his death through an accident occasioned by the negligence of servants of his employers engaged in the repair of a bridge over the railway:—

Held, affirming the judgment of Bray J., that the deceased man must, as between himself and his employers, be deemed to have undertaken the risk of such an accident, and therefore an action could not be maintained against his employers under the Fatal Accidents Act, 1846, in respect of his death.

FURTHER consideration before Bray J. of an action tried by him with a jury.

The action was brought under the Fatal Accidents Act, 1846, by the widowed mother of a collier, to recover damages in respect of his death, against colliery proprietors in whose employment he was when his death occurred through an accident alleged to have been caused by the negligence of the defendants' servants.

The defence was set up that the deceased man had been guilty of contributory negligence, and also that the servants by reason of whose negligence the accident was alleged to have been caused were in a common employment with the deceased.

The facts and the verdict of the jury appear from the judgment of Bray J.

Abel Thomas, K.C., and *John Sankey*, for the plaintiff.

Francis-Williams, K.C., and *A. Parsons*, for the defendants. (1)

Cur. adv. vult.

(1) It has not been thought necessary to report the arguments both in the Court below and in the Court of Appeal.

1908. May 22. Bray J. read the following judgment:—This action was brought by Mrs. Coldrick, a widow, the mother of the deceased, John Edgar Coldrick, to recover damages under Lord Campbell's Act for the death of her son. The son was a collier in the employment of the defendant company at their pit at Blaensychan colliery. On June 17, 1907, he was riding in a train which ran on a railway belonging to the defendants for the convenience of the men at work at their Blaensychan colliery and at their Llanerch colliery (which adjoined the first-named colliery) to take the men towards their homes. The train started from a platform at the Blaensychan colliery, proceeded towards the Llanerch colliery, where it would stop, and would then proceed further to Abersychan. The accident happened between the two collieries in the following way. The deceased arrived at the platform only just before the train started. He got into a carriage which already contained twelve persons. The carriage was intended for ten, but twelve could be accommodated on the seats. There were other carriages in the train which were not full, but it was probable that the deceased chose this carriage because some of his friends were in it. He stood up at first, but after the train started he sat on the floor of the carriage, with his feet and knees outside, his feet resting on one of the steps of the carriage. His boots would project beyond the outside of the step, which was a narrow one. On its way to Llanerch the train had to pass under a bridge, on which ran a road used for the purpose of conveying the rubbish from the Llanerch colliery to the spoil heap. On this day a mason named Jarvis, in the employment of the defendants, was, under the instructions of the defendants' engineer, building a wall by the side of the railway to strengthen the bridge, and he had erected a scaffolding against the wall and between the wall and the railway to enable him to build the wall. The carriages of a train passing along the railway would clear the scaffolding, but only by a few inches, and, if the deceased's boot projected beyond the step, it might come into contact with the scaffolding. No one actually saw how he was struck, but it is probable that his boot struck against the scaffolding, and he fell out of the carriage on to the railway bank, whence he rolled under the

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train, and was killed. I put several questions to the jury, and they found that the accident was caused by the negligence of Jarvis and of the defendants' engineer, but they could not agree as to whether Coldrick was guilty of contributory negligence. The defendants raised the defence of common employment. I put no question to the jury upon this point, because it was agreed that, if there were any facts in dispute bearing upon this defence, I should find them. The facts as admitted and found by me, in addition to those already stated, are as follows. The defendants own the two collieries, which are worked together to this extent. They communicate underground, and there is one system of ventilation for the two. The two shafts act as upcast and downcast for each other. There is one agent, one manager, one under-manager, and one engineer for the two pits. In special cases men work indiscriminately in the two pits, but the colliers who cut the coal work only in their own pit, and separate books are kept at the two collieries. Jarvis was a mason employed to do work anywhere about the two collieries, underground or above ground, and the engineer was the engineer of both collieries and the man for that purpose appointed under the statutory rules. The railway had been constructed by the defendants some twenty-five years before 1907, and was used for the conveyance of coal and materials from or to the two collieries, but mainly from or to the Llanerch colliery, as the other colliery was connected with the Great Western Railway in the other direction. Since 1900 the defendants had provided a train or trains in the morning and evening to bring the men employed to the colliery where they were working, i.e., Blaensychan and Llanerch, as the case might be, and to take them away after they left off work. The men paid nothing for the conveyance, and nothing was deducted from their wages. They used the train or walked as they chose. No passengers were taken, the train being used exclusively for the conveyance of managers, foremen, and workmen at the two collieries. The railway belonged exclusively to the defendants, and was managed entirely by them and their managers engineer, and other servants.

On these facts the defendants contended that the doctrine of

common employment was applicable, and that the plaintiff could not recover because the negligence which was found by the jury to have been the cause of the death of her son was the negligence of a fellow servant, and they asked me to enter judgment for them. The plaintiff contended that I could not enter judgment for the defendants, and, owing to the disagreement of the jury on the question of contributory negligence, that there must be a new trial on two grounds—first, that at the moment of the accident the deceased was not a servant engaged in the course of his employment; and, secondly, that, even if he were, he and Jarvis and the engineer were not fellow servants.

I will deal with the last point first. The most recent case on this point is *Burr* v. *Theatre Royal, Drury Lane.* (1) In that case the plaintiff was employed by the defendants, a theatre company, to perform in the chorus of a pantomime, and the injury was caused by a scene-shifter shifting the scenery and so causing something to fall on her head. The Court of Appeal held that the defendants were not liable, and in giving judgment Collins M.R. (2) said this: "The basis underlying the doctrine of common employment in all the cases appears to be that, under the circumstances, the injured person must be taken to have accepted the risks involved by putting himself in juxtaposition with other persons employed by the same employer, whose presence is incidental to the occupation in which he is engaged, and cannot complain of that which is a necessary or reasonable incident of the situation in which he has voluntarily placed himself. The principle so stated affords an answer to the argument which has often been introduced in these cases, namely, that the person injured is not in the same grade of employment as the person whose negligence occasioned the mischief. That argument appears to be based upon a misconception of the true principle which governs these cases. There may be such a difference between the relative positions of two persons employed by the same employer as to make it plausible to say that they cannot be considered as fellow labourers. But that consideration does not determine the question really involved, which

(1) [1907] 1 K. B. 544. (2) Ibid. at p. 553.

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is whether the possibility of negligence on the part of the person who has occasioned the mischief is not one of the risks which, under the circumstances, must be taken to have been accepted by the person injured as incidental to the employment." In *Morgan* v. *Vale of Neath Ry. Co.* (1) the plaintiff, a carpenter, engaged in doing work on the roof of an engine-shed, had been injured by the negligence of some porters who were engaged in shifting a locomotive by means of a turntable, and had allowed the engine to project so far beyond it that it struck against part of the scaffold on which the plaintiff was standing. It was held by the Exchequer Chamber that the carpenter and the porters were fellow servants. Erle C.J. (2), quoting the judgment of Blackburn J. in the Court below, which he expressly approved, said: "The principle on which this rule was established, as applicable to the present case, is very clearly put by Blackburn J. in the judgment, to which Mellor J. agreed, in the Court below: 'There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which are to be considered in his wages. I think that, whenever the employment is such as necessarily to bring the person accepting it into contact with the traffic of the line of a railway, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to such an employment, and within the rule.'" Pollock C.B. in the same case said: "For, if a carpenter's employment is to be distinguished from that of the porters employed by the same company, it will be sought to split up the employés in every large establishment into different departments of service, although the common object of their employment, however different, is but the furtherance of the business of the master; yet it might be said with truth that no two had a common immediate object. This shews that we must not over-refine, but look at the common object,

(1) (1864) 5 B. & S. 570; (1865) L. R. 1 Q. B. 149.
(2) L. R. 1 Q. B. 149, at p. 154.

and not at the common immediate object." Willes J., Byles J., and Keating J., and Bramwell B., Channell B., and Pigott B., concurred in those judgments. Now, assuming that the deceased when travelling in the train was at that moment engaged in the course of his employment, does his case come within the principles laid down in those cases? I think it clearly does. The deceased would know that from time to time servants of the defendants would or might be employed on or near the line, whether in repairing bridges or other works adjoining the railway, or repairing the permanent way, or in some other way, and that the carelessness of those servants might be the cause of an injury to the train or to those travelling by it. It is a risk he would run if he travelled by the train. It is a risk incident to his employment. It is no answer to say that he could not have contemplated such an accident as this because it was so unlikely to have happened. However unlikely, it was a possible risk, and he must be taken, in my opinion, to have accepted it. It is unnecessary for me to decide whether colliers working at one of the pits would be fellow servants of colliers working at the other, because Jarvis was one of a class of men who might happen to be working at either pit; but I should have no hesitation in finding as a fact that the two collieries, including the works above ground and underground and the railway, were worked as one concern, with one common object, and that each one of the men employed by the defendants there was the fellow servant of the others within the rules laid down in the cases I have cited.

I have now to consider the other point taken by the defendants, and, in my opinion, much the more difficult of the two, especially as I cannot find that it has ever arisen before. Now the train running on this railway was one of the means provided by the defendants to enable their servants to leave the works. They might use the train or walk along roads or ways running through the works. What is the position of a workman who is walking through his employer's works in order to reach or leave the place where he has to work? I think this is really the question I have to answer, because I cannot think that a workman

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travelling by one of these trains is in any different position from a man walking through the works. The railway is one of the modes of access provided by the employers just as much as any road or way. The workman chooses which he likes just as much as a man may choose to walk upstairs or go up in a lift where one is provided. What is his position then? First, is such a man engaged in the course of his employment? The case of *Davies* v. *Rhymney Iron Co.* (1), decided under the Workmen's Compensation Act, was cited to me, and I feel much pressed by it, as the facts, though somewhat meagrely stated in the report, seem to be the same as here. On the other hand, there are observations in the judgments of all the judges in *Holness* v. *Mackay & Davis* (2) which go to shew that, where the employer, as here, has full control over the whole premises, a man might still be in the course of his employment though his actual work was over; but I do not think it is really necessary to decide it, as it seems to be impossible that the contract of the employer with his servant should be different during the period when he is passing through his employer's works to or from his work from that during the period when he is actually at work. The risk the servant runs is of the same character, namely, the risk of some negligence on the part of his fellow servants with whom he is brought into juxtaposition. Why is it to be implied in the absence of any express contract that the employer has taken upon himself the additional responsibility of being liable for the negligence of those fellow servants? There seems to me to be no reason why he should, or why the servant should ask that he should. The act of negligence of the fellow servant Jarvis (and equally so of the engineer) was an act committed during the working hours, though the accident happened after Jarvis had left his work. I can see no reason why the risk which the servant accepts when he enters on his employment should not include the risk he runs while he is actually on his employer's premises going to or from his work. I can see every reason why it should. The risk is of precisely the same character. The servant may have to walk along the road or to travel by the train while he is

(1) (1900) 16 Times L. R. 329. (2) [1899] 2 Q. B. 319.

engaged in his work, and the employer would not be liable, and yet, if he does precisely the same thing when his work is over, it is said his employer is to be liable. It is equally difficult for the employer to prevent an accident after working hours as it would be during working hours. It is not difficult to suggest a case where it would, as it seems to me, be absurd to draw a distinction. A workman may be engaged at large docks. In the course of his employment he may have to cross a movable bridge or gangway, and he has to cross the same bridge or gangway when he goes to his work or leaves it. If the servant having the control of the bridge or gangway be careless, an accident may happen and the man crossing may fall into the water and be drowned. The employer would not be liable in the first case. Is it reasonable in the absence of any express contract that he should be liable in the second? Of course it is all subject to this, that the accident must happen on the employer's premises where the workman is brought into contact with his fellow servants. It was strongly urged for the plaintiff that the servant was invited by the defendants to enter into and travel by the train, and that that raised an implied promise by them to take reasonable care; but the servant is equally invited by the defendants to enter their premises so that he may proceed to the place where he has to work. You have to look at the character in which the person is invited in order to see what the implied promise is. The implied promise varies according to whether the person invited is a customer, a guest, a stranger, or a servant, and, if he be invited as a servant and for the purpose of enabling him to perform his service or leave it, it seems to me that the promise to be implied is to be that which is raised by the relationship between the master and his servant. The master does undertake to use reasonable care in that part of the work which he personally undertakes, but does not undertake that fellow servants shall use reasonable care, the risk from negligence of the fellow servants being one which the servant accepts. I come, therefore, to the conclusion that the defence of common employment is properly raised here and is an answer to the action, and judgment must be entered for the defendants. I have not been asked to exercise any powers under the Workmen's

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Compensation Act, and consequently give no decision or opinion upon this question.

Judgment for the defendants.

The plaintiff appealed.

1909. Jan. 14. *Abel Thomas, K.C.* (*John Sankey* with him), for the plaintiff. The doctrine of common employment is not applicable to this case, first because the persons whose negligence was found by the jury to have occasioned the accident to the deceased were not his fellow servants within the meaning of that doctrine, and secondly because, at the time when the accident happened, the deceased was not engaged in his employment, but occupied the same position towards his employers as a person not their servant would have occupied. It was laid down by Lord Brougham in *Bartonshill Coal Co.* v. *McGuire* (1) that "to bring the case within the exemption, there must be this most material qualification, that the two servants shall be men in the same common employment, and engaged in the same common work under that common employment." The work being done to the bridge and the risk incurred in consequence were quite foreign to the work which the deceased was employed to do. The Blaensychan colliery at which he worked in cutting coal was really a distinct colliery from the Llanerch colliery, and it was for the purposes of the latter colliery only that the road which was carried by the bridge over the railway was used. If the defendants' mason and engineer had been employed in some operation in or in connection with the colliery where the deceased worked, they might no doubt have been his fellow servants for the purposes of the doctrine of common employment, but, under the circumstances of the present case, they cannot be considered as occupying that position, because the work that was being done to the bridge was done for the purposes of the Llanerch colliery only. Suppose that a collier was, while walking home on the road, after his day's work was done, run over through the negligence of his employer's coachman; or suppose that, the colliery proprietors being also the occupiers of a farm, their ploughman had negligently allowed his horses to be on the railway, by reason of

(1) (1858) 3 Macq. 300, at p. 313.

which an accident happened to a collier in the train; it could not in those cases be contended that the doctrine of common employment applied. Here the mason and engineer, being employed when the accident happened for the purposes of the Llanerch colliery, cannot be considered as fellow servants of the deceased, who worked at the Blaensychan pit, any more than the coachman or ploughman in the cases supposed. The deceased cannot be deemed, on entering into his employment at the Blaensychan colliery, to have contemplated any risk arising from the negligence of the defendants' servants when employed in connection with the Llanerch colliery. It is impossible to suppose that, when he entered into his employment at the Blaensychan pit, the deceased would anticipate a risk arising from the negligence of a mason employed in repairing a bridge on a road used only for the purposes of the Llanerch colliery.

Again, the doctrine of common employment can only apply where there are fellow servants working together as servants for a common object. In this case the deceased man had finished his day's work and was going home. He was then in the same position towards his employers as any stranger would have been who had been invited by the colliery proprietors to travel in their train. They would have been liable to such a licensee for the negligence of their servants in the absence of any stipulation to the contrary. The trains were run primarily for the benefit and convenience of the employers, in order to facilitate their obtaining a punctual supply of labour day by day at their pits, so that the men using them cannot be considered as being merely gratuitous licensees. They must be considered as having been invited to use them, at any rate partly, for the benefit of the employers, who were therefore liable for want of reasonable care on the part of their servants. It could not be said that the deceased was engaged in his employment when he was going home in the train after the work which he was employed to do was over for the day: see the cases of *Holness* v. *Mackay & Davis* (1) and *Davies* v. *Rhymney Iron Co.* (2), decided under the Workmen's Compensation Act, 1897. It would be a considerable extension of the

(1) [1899] 2 Q. B. 319. (2) 16 Times L. R. 329.

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doctrine originated by the decision in *Priestley* v. *Fowler* (1) to apply it to a time when the servant is not engaged in his employment. There is up to the present time no authority for such an extension of that doctrine, and it is submitted that the Court ought not so to extend it. In *Tunney* v. *Midland Ry. Co.* (2) it was part of the contract of service that the servant should travel in the train. [He also cited *Bartonshill Coal Co.* v. *Reid* (3); *Charles* v. *Taylor* (4); *The Petrel* (5); *Burr* v. *Theatre Royal, Drury Lane* (6); *Morgan* v. *Vale of Neath Ry. Co.* (7); *Swainson* v. *North Eastern Ry. Co.* (8); *Hutchinson* v. *York, Newcastle, and Berwick Ry. Co.* (9); *Johnson* v. *Lindsay & Co.* (10)]

Francis-Williams, K.C. (*A. Parsons* with him), for the defendants. The questions which arise are, first, whether the doctrine of common employment applies to servants of the same employer employed as the deceased and the servants whom the jury have in this case found guilty of negligence respectively were; and, secondly, whether the fact that the deceased had ceased cutting coal for the day prevents the application of that doctrine. The test laid down by Blackburn J. and adopted by the Exchequer Chamber in the case of *Morgan* v. *Vale of Neath Ry. Co.* (7) was whether the risk of injury from the negligence of the other servant was so far a natural and necessary consequence of the employment that the servant must be taken to have accepted it as incidental thereto. The Blaensychan and Llanerch collieries were worked together as, and really formed, one colliery, and the colliers employed in either of the two pits must be taken to have accepted any risk by reason of negligence on the part of the workmen employed in connection with the other pit to which their employment might expose them. The cases shew that the "employment," for the purposes of the doctrine of common employment, must not be treated as confined to the time when the servant is actually doing the work which he is employed to do: see the case of *Sharp* v. *Johnson & Co.* (11) and *Cross*,

(1) (1837) 3 M. & W. 1.
(2) (1866) L. R. 1 C. P. 291.
(3) (1858) 3 Macq. 266.
(4) (1878) 3 C. P. D. 492.
(5) [1893] P. 320.
(6) [1907] 1 K. B. 544.
(7) 5 B. & S. 570; L. R. 1 Q. B. 149.
(8) (1878) 3 Ex. D. 341.
(9) (1850) 5 Exch. 343.
(10) [1891] A. C. 371.
(11) [1905] 2 K. B. 139.

Tetley & Co. v. *Catterall* (1) referred to in the judgment of Collins M.R. in that case. (2) The case of *Tunney* v. *Midland Ry. Co.* (3) is on all fours with the present case with the exception that there it was part of the contract of employment that the plaintiff should be carried in the train to and from his work. That distinction cannot be material. That case clearly shews that the "employment" for the purposes of the doctrine of common employment cannot be confined to the time when the servant is actually doing the work for which he is employed. The question is, What are the risks which he must be taken to have contemplated, and undertaken to bear, as incidental to his employment? In a case like the present, where it had been the regular practice for years that the colliers should be carried to and from their work on the employers' railway in the train provided by them, such carriage must be considered as an incident of the employment, of which a collier entering the employers' service must be supposed to have been aware, and the risk of negligence on the part of the employers' servants in the management of the railway must therefore be deemed to be one of the natural and necessary consequences of the employment which the collier impliedly accepted.

Abel Thomas, K.C., in reply. Assuming that the doctrine of common employment cannot be confined to the time during which the servant is actually doing the work for which he is employed, it is not necessary for the plaintiff to contend that for the purposes of that doctrine the employment of the deceased ended the moment he left off cutting coal. It might continue while he was engaged in leaving the pit where he had been working. But when he had got to the surface, and was going home in the train a long way from the place of his labours, he could not reasonably be said to be engaged in his employment. He was then really in the same position as if he had been walking on the highway towards his home.

VAUGHAN WILLIAMS L.J. In my opinion the decision of Bray J. was right. I propose to deal with the case, not on the basis of

(1) Not reported. (2) [1905] 2 K. B. 139, at p. 145.
(3) L. R. 1 C. P. 291.

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its having been found as a fact that, under the contract of employment between the defendants and the deceased workman, the latter had a right to the use of the railway, but on the basis that all he had was the option of using it for the purpose of coming to and departing from the works, so long as it was provided for that purpose by his employers. Further, I do not propose to enter into a discussion as to whether there existed in this case two collieries of which the defendants were proprietors, or only one colliery. I shall treat the case as Bray J. did, as in no way differing in principle or in the result from a case in which there was only one colliery with a railway affording means of access to and departure from that colliery, which was worked by the same proprietors. That being so, the first question which I have to ask myself in this case is whether there was any express contract as to the terms upon which the user of the railway by the deceased collier was to take place or the risks which he undertook in using it. It is clear that there was no such express contract. Then, secondly, that being so, the question arises whether there was any, and, if so, what, implied contract on that subject. There cannot, I think, really be any dispute as to what is the basis, in the case of the contract between master and servant, of the doctrine of common employment, which debars the servant from maintaining an action against his master in respect of an injury occasioned to him by the negligence of his fellow servant, where the master has used due skill and care in the selection of the particular servant whose negligence has caused the injury. The case of *Bartonshill Coal Co.* v. *McGuire* (1) was cited to us, and reliance was placed by the plaintiff's counsel upon certain expressions used by Lord Brougham in his judgment in that case, but it must be observed that Lord Cranworth was also a party to that decision; and, when one looks back to the case of *Bartonshill Coal Co.* v. *Reid* (2), decided just previously in the House of Lords, in which also Lord Cranworth gave a judgment, it is obvious that what he there said is quite inconsistent with the meaning which the plaintiff's counsel sought to put upon the observations of Lord Brougham. All the decisions on the subject appear to me to proceed on the footing that the doctrine

(1) 3 Macq. 300. (2) 3 Macq. 266.

of common employment and the consequent exoneration of the master from liability rest upon the basis of its being an implied term of the contract of employment that the servant undertakes the risk of negligence by his fellow servants. I think that, when that is remembered, it becomes fairly easy to answer the question raised in the case now before us. The question arises, what are the risks which the servant, by the contract of employment, impliedly undertakes when he enters into the employment? I think that those risks extend to any patent risk to which the servant exposes himself by reason of his employment in respect of negligence by his fellow servants. It was argued that the implied contract only extends to risks which may arise during the time when the workman is actually at work as the servant of his employer. I do not think that there is any such limitation as suggested. For my part, I think that the implied term of the contract of service to which I have referred extends to all cases where there is obviously occasion for the use by the workman of means of access to and departure from his work, which are provided by the master, and which will be under the management of his servants, so long as those means of access and departure are so provided. In my opinion, this collier must be supposed to have known, when he entered into the service of his employers, of the means of access and departure by the train upon their railway, which was provided by them for the express purpose of such access and departure by their workmen, and that it was there for that purpose whenever he thought fit to use it. That being a matter patent to every collier employed by the defendants, I think that the implied contract which must be taken in this case to have arisen between the servant and his employers is that, if the former availed himself of the means of access and departure so provided, he took upon himself the risk of negligence on the part of the servants of the employers who would have the control and management of the railway and its necessary adjuncts, such, for instance, as bridges. For my own part, I cannot doubt that included among the risks impliedly undertaken by the workman in this case was the negligence of persons employed by the defendants to keep the railway itself, or the bridges over it

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or anything necessary in connection therewith, in working order, whether for the carriage of the passengers or for the removal of any subject-matter from the colliery. The question has been raised as to how long the implied term with reference to the negligence of fellow servants to which I have referred must be considered as continuing in operation. It was suggested that, assuming that there was such an implied contract, it ceased to be in operation when the work of the deceased collier for the day came to an end by reason of his having come up from the pit where he was working. It follows from what I have said that I do not think that is so. I think that it continued in operation as long as the collier was using, for the purpose of departure from the colliery, the means provided by the defendants for access thereto and departure therefrom by their colliers, and which both parties knew, at the time of the making of the contract of service, to be intended to be used for that purpose. In my opinion the judgment of Bray J. was right and this appeal should be dismissed.

FARWELL L.J. I am of the same opinion. The general rule of law by which a master is liable for injury occasioned to a person by the negligence of his servant, acting within the scope of his employment, does not apply to the case of an injury occasioned to a servant by the negligence of a fellow servant. The reason for this, as stated by Shaw C.J. in the American case of *Farwell* v. *Boston and Worcester Railroad Corporation* (1), cited in a note to *Bartonshill Coal Co.* v. *McGuire* (2), is that, with regard to such a matter, the rights of a master and his servant, inter se, are determined by the express or implied contract between them. It is true that the contract of employment is, as a rule, silent as to anything beyond the nature and period of the employment and the remuneration for it; but, as in the case of many other contracts, terms have to be implied and read into it, in order to give effect to what must be presumed to have been the intention of the parties. The best way of expressing my view on the subject will be to read a passage from the judgment of Shaw C.J. in the case to which I have referred. He

(1) (1842) 4 Metcalf (45 Mass.), 49. (2) 3 Macq. 300.

says: "It was conceded that the claim could not be placed on the principle indicated by the maxim respondeat superior, which binds the master to indemnify a stranger for the damage caused by the careless, negligent, or unskilful act of his servant in the conduct of his affairs. The claim, therefore, is placed, and must be maintained, if maintained at all, on the ground of contract. As there is no express contract between the parties applicable to this point, it is placed on the footing of an implied contract of indemnity arising out of the relation of master and servant"; and further on he says: "The master, in the case supposed, is not exempt from liability, because the servant has better means of providing for his safety, when he is employed in immediate connection with those from whose negligence he might suffer; but because the implied contract of the master does not extend to indemnify the servant against the negligence of any one but himself; and he is not liable in tort, as for the negligence of his servant, because the servant does not stand towards him in the relation of a stranger, but is one whose rights are regulated by contract, express or implied." Therefore, in my view, the question must depend on the true construction of the contract between employer and employed, whether express or implied. The facts in the present case were as follows. The deceased man was employed in the ordinary way to work as a collier in one of the defendants' pits, which, I agree, must, for the purposes of this case, be regarded as forming parts of one colliery. One incident of his employment was that, as a matter not of right but of grace, he was allowed to use, free of charge, a train which his employers ran for the benefit of workmen and others employed at their colliery, but not of outsiders. If his enjoyment of that privilege had been by contract, the case would have been undistinguishable from *Tunney* v. *Midland Ry. Co.* (1), in which Willes J. said: "The circumstance of the plaintiff's day's work being at an end when the accident happened can make no difference: for it was part of his contract that he was to be carried by the train to and from the place where his work happened to be." That case would be on all fours with the present, if it had been in this case part of the contract between

(1) L. R. 1 C. P. 291.

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Farwell L.J.

the employers and their servant that he should be carried in this train; but the learned judge in the Court below has not found that this was the case, and, that being so, I do not feel myself at liberty in this Court to do so. He has, however, found that, as a matter of invitation by the employers, the workmen employed at the colliery had been in the habit of using, and had never been prevented from using, the trains for the purpose of coming to and returning from the colliery where they worked, and that this had been the invariable course ever since the year 1900. Under those circumstances I think that the enjoyment of that advantage must be regarded as one of the incidents of their employment. In *Morgan* v. *Vale of Neath Ry. Co.* (1) Blackburn J. stated the principle applicable in such cases thus: "There are many cases where the immediate object on which the one servant is employed is very dissimilar from that on which the other is employed, and yet the risk of injury from the negligence of the one is so much a natural and necessary consequence of the employment which the other accepts, that it must be included in the risks which are to be considered in his wages. I think that, whenever the employment is such as necessarily to bring the person accepting it into contact with the traffic of the line of a railway, risk of injury from the carelessness of those managing that traffic is one of the risks necessarily and naturally incident to such an employment, and within the rule." In applying the test so suggested to the facts of the present case, I take the word "necessary" as used by the learned judge to mean necessary, if and when the servant chooses to avail himself of the facility afforded by the master. I do not think that, to make the risk in question a natural and necessary consequence of the employment, it is essential that the servant should be bound by the terms of his engagement to make use of that facility; it is sufficient if his use of it by the master's invitation is an incident of his employment. In *Gautret* v. *Egerton* (2), where there was an action under the Fatal Accidents Act, 1846, in which the plaintiff claimed damages in respect of the death of a person, who was alleged to have lawfully gone upon the defendants' premises by their permission, by reason of their negligence

(1) 5 B. & S. 570; L. R. 1 Q. B. 149. (2) (1867) L. R. 2 C. P. 371.

in keeping those premises in an unsafe condition, Willes J. in giving judgment said, with regard to the declaration in such a case: "It ought to state the facts upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged. It is not enough to shew that the defendant has been guilty of negligence, without shewing in what respect he was negligent, and how he became bound to use care to prevent injury to others"; and further on he said: "The consequences of those accidents are sought to be visited upon these defendants, because they have allowed persons to go over their land, not alleging it to have been upon the business or for the benefit of the defendants, or as the servants or agents of the defendants: nor alleging that the defendants have been guilty of any wrongful act, such as digging a trench on the land, or misrepresenting its condition, or anything equivalent to laying a trap for the unwary passengers: but simply because they permitted these persons to use a way with the condition of which, for anything that appears, those who suffered the injury were perfectly well acquainted." Because it contained no such allegations as those referred to by the learned judge the declaration in that case was held to be bad. Here, therefore, the plaintiff is in this dilemma. She must allege that the deceased used the train as being a workman in the defendants' employment, for otherwise there was no justification for his being in the train at all; and, in the absence of such a justification, the finding of negligence on the part of Jarvis and the defendants' engineer would amount to nothing. But, when once the conclusion is arrived at that the deceased man's title to use the train arose from its being a facility which had been for many years provided by his employers for use by their workmen as such, it appears to me that such use of it was an incident of his employment with regard to which he impliedly undertook the risk of any injury arising from the negligence of persons in a common employment with himself as being a natural and necessary consequence of that employment. There is only one other observation which I desire to make. I do not regard this case as being governed by any of the decisions in cases under the Workmen's Compensation Act, 1897, to which we have been

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referred. In those cases the Court had to construe the words "arising out of and in the course of the employment" as used in that Act. It is not necessary for the purposes of this appeal to decide whether the accident in the present case came within those words, and I express no opinion on that point.

KENNEDY L.J. I am of the same opinion. I think the judgment of Bray J. was perfectly right. In dealing with the case he divided it into two branches. He dealt first with the contention that, assuming that the deceased workman could be said when he met with the accident which caused his death to have been engaged in his employment, Jarvis and the defendants' engineer, through whose negligence, as the jury found, his death was caused, were not his fellow servants. The learned judge held that they did stand towards him in the relation of fellow servants. I do not propose to refer to that point further than by saying that in my opinion the reasoning of the learned judge with regard to it was right. Then there was the further contention on the part of the plaintiff that at the time of the accident the deceased workman was not a servant of the defendants engaged in the course of his employment. With regard to that it appears to me that, when once the facts are clearly ascertained, the conclusion arrived at by the learned judge is the only possible one. I agree that the case as it stands is in some respects novel. The deceased, when the accident happened, was being carried in a train belonging to his employers upon their premises after he had left off the work which he was paid for doing for the day. He had a right to travel in that train only because he stood towards its owners in the relation of a servant who was allowed to use the train for the purposes of going to and returning from that part of the premises of his employers where he worked, and he would not otherwise have been allowed to be a passenger in the train. Under those circumstances the question arises, on what terms as between himself and his employers was he allowed to be in that train? Were his employers by reason of those terms liable for any injury occasioned to him while in the train through the negligence of fellow servants in their employ? It is clear on the authorities

with regard to those who come upon the premises of another, not as trespassers, but as licensees, by the leave of the owner, that the claim of such persons to protection and reasonable care on the part of the owner of the premises depends upon the character in which they are allowed to exercise the privilege or use the opportunity of being upon the premises. A person coming upon premises by leave of their owner as a mere licensee will be entitled only to such reasonable care on the part of the owner's servants as all outsiders are entitled to. Such a case was *Thatcher* v. *Great Western Ry. Co.* (1), where injuries were occasioned by the negligence of the servant of a railway company to a person who had come to see a friend off by the train, and it was held that, if a person was permitted to come upon premises by their owner, it was the duty of the latter to use reasonable care not to injure that person. Where a person is invited to come upon premises by their owner for reward to him, a higher duty may be imposed upon that owner. In this case, if the workman had been asked at the time by what right he was upon the premises of his employers using their train, he must have answered that it was because his relation to them was that of a servant, and he was as such, and by virtue of that relation, permitted to use their train. That being so, it seems to me that the way in which the learned judge dealt with the case was correct. Having pointed out that the responsibility of the owner inviting a person to enter his premises varies according to the character in which that person is invited, he said that, if he is invited in the character of a servant, and in connection with and furtherance of the performance of his service, the responsibility of the master for his safety must depend upon the promise to be implied from the relationship between master and servant. Then what is that promise? It seems to me to be one which involves that there shall be no liability on the part of the employers to the servant for an injury occasioned to him through the negligence of fellow servants, while being carried in a train upon the employers' premises by their permission for the purpose of returning from his work. The servant must be supposed to have contemplated that the train and the premises

(1) (1893) 10 Times L. R. 13.

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Kennedy L.J.

upon which it was would be managed by and be under the control of the servants of his employers; and, although in this case there was not, as in the case of *Tunney* v. *Midland Ry. Co.* (1), any actual contract that the servant should be carried in the train, I think the inference to be drawn from the relation between the parties is that the user by the deceased workman of the train was upon the terms that the employers were not to be liable to him for the negligence of his fellow servants in the management of the railway.

Appeal dismissed.

Solicitors for plaintiff: *Metcalfe & Sharpe, for T. S. Edwards, Newport, Mon.*

Solicitors for defendants: *Bell, Brodrick & Gray, for C. & W. Kenshole, Aberdare.*

E. L.

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Jan. 20.

[RAILWAY AND CANAL COMMISSION.]

CHANCE & HUNT, LIMITED *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

Railway and Canal Commission—Practice—Undue Preference—Through Rate—Joinder of Defendants.

Traders who complain of a through rate as being an undue preference must join as defendants all the companies concerned in making the through rate.

APPEAL from an order of the registrar striking out portions of the application unless certain railway companies were added as defendants as being parties to certain through rates complained of by the applicants as undue preferences.

The applicants stated—

1. That they carried on business as manufacturers of salt and other chemicals at their works situate at Oldbury, in the county of Worcester, and at Lea Brook, Wednesbury, and at Stafford, both in the county of Stafford:

2. That their business was carried on under stress of severe

(1) L. R. 1 C. P. 291.

competition with other manufacturers at Widnes, Warrington, and other parts of the United Kingdom, and particularly with seven firms mentioned in the seven sub-paragraphs of paragraph 5 of the application:

3. That for the purpose of their business they purchased large quantities of coal, limestone, coke, iron pyrites, and goods of many other descriptions, which were despatched to them by the vendors of the same over the lines of the defendants, or the lines of other companies communicating with the lines of the defendants, and were thence delivered to the applicants at stations of the defendants at Spon Lane and Wednesbury:

4. That for the purpose of their business they despatched from their works through the said stations of the defendants and over the lines of the defendants to various parts of the country large quantities of goods which they had sold to their customers.

The material portions of paragraph 5 were as follows:

5. "The defendants have for some time past unduly preferred, and still unduly prefer, rivals and competitors of the applicants carrying on business in the United Kingdom. The following are instances of undue preferences on which the applicants will rely:—

"(1.) United Alkali Company, Limited, Widnes.—The defendants have unduly preferred, and still unduly prefer, the said company in respect of the carriage of alkali between Widnes, Northwich, St. Helens, and Warrington on the one hand and various other places on the other hand, in that they carry alkali for the said company between Widnes, Northwich, St. Helens, and Warrington and such other places respectively at rates which in proportion to the distances are lower than the rates charged to the applicants and their customers for the carriage of alkali between Oldbury or Wednesbury and such other places respectively. Particulars of such places are set out in schedule A hereto."

Schedule A consisted of a list of places, thirty-two in number, of which some were on the defendants' railway and others were on the railways of other companies.

"(6.) Messrs. Greaves, Bull & Lakin, Limited, of Long Itchington.—The defendants unduly prefer the said company in

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respect of the carriage of cement between Long Itchington and other places by charging them rates upon such goods which are less in proportion to the distance than the rates charged to the applicants on the carriage of cement to the said places respectively. Particulars of the said stations are set out in schedule B hereto."

Schedule B consisted of a list of stations, six in number, all being on the railway of a company other than the defendants.

The applicants claimed damages and an order enjoining the defendants to desist from giving undue preference to rivals and competitors of the applicants, and particularly the firms mentioned in paragraph 5 of the application.

The defendants took out a summons to strike out sub-paragraphs 1 and 6 of paragraph 5 of the application unless the railway companies interested in the rates set out in schedules A and B of the application were joined as co-defendants.

Upon this summons the registrar made an order that the defendants should inform the applicants' solicitors of railway companies who carried the traffic referred to in schedules A and B of the application; that places mentioned in schedule A not on the defendants' railway should be struck out, and that paragraph 5, sub-paragraph 6, and schedule B should be struck out; or alternatively that the applicants should have leave to join other railway companies parties to the rates mentioned in paragraph 5, sub-paragraphs 1 and 6, of the application.

From this order the applicants appealed.

Disturnal, for the applicants. The order of the registrar was wrong and ought to be set aside. What is complained of here is an undue preference, a breach of s. 2 of the Railway and Canal Traffic Act, 1854—in other words, a tort. A plaintiff who complains of a joint tort is not obliged to join as defendants all the tortfeasors; he may sue all or any one or more at his option. If he chooses to sue some only, they cannot insist on having the others joined.

[A. T. LAWRENCE J. referred to *Mapperley Colliery Co.* v. *Midland Ry. Co.* (1)]

(1) (1896) 65 L. J. (Q.B.) 272; 9 Ry. & Ca. Tr. Cas. 147.

In that case the applicants alleged a wrongful raising of a rate by the defendants "jointly with other railway companies" without making the other companies parties. In the present case no combination with other companies is alleged. The applicants contend that the defendants, with whom alone their contracts for carriage are made, are the only parties responsible to them.

[A. T. LAWRENCE J. In *In re Taff Vale Ry. Co.* (1), a case raising the question of an undue preference, Wright J. expressed the view that all the interests involved should be before the Court.]

The applicants in the present case may be right or may be wrong in saying that the defendants are the wrong-doers. That touches the merits of the application. The argument here touches not the merits of the application, but the institution of the proceedings.

Lynden Macassey, for the defendants, was not called upon.

A. T. LAWRENCE J. I think that the order of the registrar was right and should stand. The argument of Mr. Disturnal is too wide and the analogy to actions of tort is not sufficiently exact to control the case before us. It is quite possible that the London and North Western Railway Company may be charging precisely the same mileage rate in every case. That being so, I am not prepared to say that they are guilty of an undue preference, at any rate unless and until all the parties are before the Court, so that we may see how the rate is compounded in respect of each of the routes in question. Mr. Disturnal contends that as they are in each case the company making the contract, that is enough to make them responsible; but in my view that is not sufficient to lead to the conclusion that they are the company giving the undue preference, if any. For these reasons I think that this appeal should be dismissed.

THE HON. A. E. GATHORNE-HARDY. I agree. I think it is inconvenient to deal with this matter without having the other companies before the Court.

SIR JAMES WOODHOUSE. I agree. I think in the examination of all these questions of rates, and especially of through rates,

(1) (1900) 11 Ry. & Ca. Tr. Cas. 89.

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the balance of convenience makes it desirable that all the parties concerned in the making of the rate should be before the Court.

Appeal dismissed.

Solicitors for applicants: *Flux, Leadbitter & Neighbour, for Slater & Co., Darlaston.*

Solicitor for defendants: *C. de J. Andrewes.*

W. H. G.

C. A.

1909

Jan. 23.

[IN THE COURT OF APPEAL.]

MIDDLESEX COUNTY COUNCIL *v.* KINGSBURY URBAN DISTRICT COUNCIL.

Local Government—Local Inquiry—Person appointed by County Council—Remuneration—"Expenses"—Liability of District Council—Local Government Act, 1894 (56 & 57 *Vict. c.* 73), *s.* 72, *sub-s.* 4.

Sect. 72, sub-s. 4, of the Local Government Act, 1894, provides that where a county council hold a local inquiry under that Act or under the Local Government Act, 1888, on the application of any inhabitant of a district, the expenses incurred by the county council in relation to the inquiry (including the expenses of any committee or person authorized by the county council) shall be paid by the council of that district:—

Held, that a district council is not liable under that section to pay for the remuneration of a barrister appointed by a county council to hold a local inquiry under s. 57 of the Local Government Act, 1888.

APPEAL from Grantham J.

In March, 1906, certain inhabitants in the urban district of Kingsbury in Middlesex presented a petition to the Middlesex County Council, making certain allegations with regard to the way in which the local government of the district was being carried on and asking that the county council should order an inquiry to be held in the locality under s. 57 of the Local Government Act, 1888, in order that the county council might, if the result of the inquiry proved the necessity, make an order under s. 57 attaching the urban district of Kingsbury to an adjoining district, or, alternatively, increasing the number of councillors in the Kingsbury Urban District Council. The

county council, being satisfied that a prima facie case had been made out for the proposed changes, ordered an inquiry to be held and appointed a barrister as commissioner to hold the inquiry. The inquiry was duly held and a report was made by the commissioner to the county council, in consequence of which an order was made increasing the number of members of the Kingsbury Urban District Council. The commissioner's fees amounted to 121*l.*, being 11*l.* for each of the eight days on which he sat to hold the inquiry, 5*l.* 10*s.* for each of two applications made to him at his chambers, and 22*l.* for making the report. The Middlesex County Council brought this action against the Kingsbury Urban District Council to recover the said sum of 121*l.* on the ground that it was a sum payable by the district council under s. 72, sub-s. 4, of the Local Government Act, 1894. (1)

The action was tried by Grantham J. without a jury, who gave judgment for the plaintiffs, holding that the plaintiffs were entitled to recover, but that the fees charged in respect of the applications in chambers and the preparation of the report were excessive, and he therefore reduced the sum claimed by sixteen guineas. The defendants appealed.

Macmorran, K.C., and *R. C. Glen*, for the defendants. The defendants are not liable to the plaintiffs for any part of the fees

(1) Local Government Act, 1894 (56 & 57 Vict. c. 73), s. 72: "(1.) The expenses incurred by the Local Government Board in respect of inquiries or other proceedings under this Act shall be paid by such authorities and persons and out of such funds and rates as the Board may by order direct, and the Board may certify the amount of the expenses so incurred, and any sum so certified and directed by the Board to be paid by any authority or person shall be a debt from that authority or person to the Crown. (2.) Such expenses may include the salary of any inspector or officer of the Board engaged in the inquiry or proceeding, not exceeding three guineas a day." "(4.) Where a county council hold a local inquiry under this Act or under the Local Government Act, 1888, on the application of the council of a parish or district, or of any inhabitants of a parish or district, the expenses incurred by the county council in relation to the inquiry (including the expenses of any committee or person authorized by the county council) shall be paid by the council of that parish or district, or, in the case of a parish which has not a parish council, by the parish meeting; but, save as aforesaid, the expenses of the county council incurred in the case of inquiries under this Act shall be paid out of the county fund."

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paid to the barrister who held the inquiry. Sect. 57, sub-s. 1, of the Local Government Act, 1888, provides that the county council may cause "such inquiry to be made in the locality . . . . as may be prescribed," which by s. 87, sub-s. 4, means as prescribed by the Local Government Board, and by art. 1 of the Regulations as to Inquiries under s. 57 of the Act of 1888, issued by the Local Government Board in 1889, these inquiries are to be held, as the county council may direct, either by a committee of the county council or by some person appointed by the county council. The holding of these administrative inquiries is a part of the duty of the county council, and it may be delegated either to a committee or to some person appointed by them, who is usually the clerk to the county council. It was never intended that the county council should appoint some outside person who would require to be paid large fees for doing work which could be equally well done for nothing by a committee of the county council, and if a person who has to be paid is appointed the district council is not liable for his remuneration. The plaintiffs rely on the words in sub-s. 4 of s. 72 of the Local Government Act, 1894, "including the expenses of any committee or person authorized by the county council," but those words do not refer to the remuneration of the person holding the inquiry; they only include out of pocket expenses and possibly also any expenses incurred in respect of sending out notices or of hiring a hall in which to hold the inquiry. If sub-s. 4 is contrasted with sub-s. 2, which expressly provides that when an inspector holds an inquiry the expenses shall include his salary, it becomes quite clear that the word "expenses" in the sentence in brackets in sub-s. 4 does not include the remuneration of a person appointed to hold the inquiry. It is not admitted that there is any power to pay a person for holding an inquiry under s. 57, but, if there is, it is a payment which must be made by the county council under the last words of sub-s. 4.

English Harrison, K.C., and *R. W. Harper*, for the plaintiffs. A county council has full power to appoint a barrister to hold an inquiry under s. 57, and if a barrister is appointed there must be power to pay him. In cases under sub-ss. 1 and 2 of

s. 72 the expenses incurred by the Local Government Board are to be dealt with as the Board may direct, but the scheme of sub-s. 4 is different, for there the Act expressly directs that the expenses incurred by the county council in relation to the inquiry are to be paid by the district council. If it were not for the words in brackets it could not be contended that the expenses incurred by the county council did not include the remuneration of the person authorized to hold the inquiry. The words in brackets do not cut down the earlier part of the sub-section and were introduced in order to prevent it being said that the expenses of the committee or person authorized were not expenses of the county council. The last words of sub-s. 4 apply to all inquiries with the exception of inquiries under s. 57, which have already been expressly dealt with in the earlier part of sub-s. 4, and the county council are therefore not liable under those last words to pay the fees of the person appointed to hold an inquiry under s. 57.

VAUGHAN WILLIAMS L.J. I am opinion that this appeal must be allowed. It seems to me to be quite plain that the word "expenses" where it occurs in the sentence in brackets in the middle of sub-s. 4 of s. 72 of the Local Government Act, 1894, can only receive one interpretation, namely, out of pocket expenses, and that it does not include the remuneration payable to a person who has been appointed by a county council to hold a local inquiry under s. 57 of the Local Government Act, 1888. If that construction is placed upon the words in brackets, the last words of sub-s. 4, "save as aforesaid, the expenses of the county council incurred in the case of inquiries under this Act," become very easy of construction and plainly indicate that there is a residue of expenses which will not have to be borne by the district council, but by the county council. I think that the very limitation that is comprised in the construction which I have put upon the words in brackets shews that there is something which necessitates and justifies the words at the end of the section. Judgment must therefore be entered for the defendants.

FARWELL L.J. I am of the same opinion. Article 1 of the Regulations of the Local Government Board as to Inquiries

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Farwell L.J.

under s. 57 of the Local Government Act, 1888, provides that "Prior to any order being made by a county council in regard to a proposal for all or any of the things specified in sub-s. 1 of s. 57 of the Local Government Act, 1888, a local inquiry, at which all persons interested may attend and be heard, shall be held in regard to the proposal as the council may direct, either by a committee of the county council or by some person appointed by the county council to hold such inquiry." It would follow from that regulation that "the expenses incurred by the county council in relation to the inquiry" in sub-s. 4 of s. 72 of the Act of 1894 would but for the following words in brackets have included not only the out of pocket expenses of the person appointed by the county council to hold the inquiry, but also his remuneration if he had to be paid in order to obtain his services. But the presence of the words in brackets in sub-s. 4 makes it impossible to give that construction to the words "expenses incurred by the county council in relation to the inquiry." In my opinion the words "expenses of any committee or person authorized by the county council" cannot be held to include remuneration paid to a person appointed by the county council to hold the inquiry, for I think that that remuneration is provided for by the last words of sub-s. 4, "save as aforesaid, the expenses of the county council incurred in the case of inquiries under this Act shall be paid out of the county fund." It is true that that is a general clause relating to all inquiries by county councils under the Act, but it includes also the residue of expenses which has not been provided for by the earlier part of sub-s. 4. So far as I can see there would be no residue at all, if it were not the exclusion arising by necessary implication from the words in brackets.

KENNEDY L.J. I agree. The language of sub-s. 4 of s. 72 of the Act of 1894 is not free from difficulty, but on the whole I think that the interpretation we are putting on it is the right one.

Appeal allowed.

Solicitor for plaintiffs: *Sir Richard Nicholson.*

Solicitors for defendants: *J. Deacon Newton & Co.*

F. O. R.

In re SPRATLEY.

1909
Jan. 25.

Bankruptcy—Practice—Bankrupt's Application for Discharge—Creditors "to be notified"—Fees—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *s.* 127—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 8, *sub-s.* 6—*Bankruptcy Rules*, 1886 *and* 1890, *r.* 235—*Scale of Fees*, 1890, *Table A.*

Rule 235 of the Bankruptcy Rules, 1886 and 1890, which provides that notice of a bankrupt's application for his discharge shall be sent to the creditors "whether they have proved or not," is not inconsistent with sub-s. 6 of s. 8 of the Bankruptcy Act, 1890, which enacts that the notice shall be sent to "each creditor who has proved." The rule merely imposes a further obligation on the bankrupt. Notice therefore of a bankrupt's application for his discharge must be sent not only to each creditor who has proved, but also to each person whose name the debtor has entered in his statement of affairs as a creditor, and the bankrupt must pay the scale fee of "1*s.* for each creditor to be notified," in table A to the Act of 1890, in respect of all such creditors.

This was an application by a bankrupt for his discharge which raised a point of practice which the registrar referred to the judge in these circumstances.

In 1901 the debtor was adjudicated bankrupt, and the official receiver became the trustee in the bankruptcy. The debtor entered in his statement of affairs the names and addresses of nineteen persons as his creditors, but only six of these lodged proofs in the bankruptcy. There was no estate, and no dividend had been paid.

On January 6, 1909, the bankrupt, having obtained, pursuant to r. 235 of the Bankruptcy Rules, 1886 and 1890, a certificate from the official receiver that the number of his creditors was nineteen, applied to the Court that a day might be fixed for the hearing of his application for discharge. On being asked for 19*s.*, being the fees under table A to the Act of 1890, on the basis that there were nineteen creditors to whom notice of the application would have to be sent, the bankrupt objected that under sub-s. 6 of s. 8 of the Act of 1890 only those creditors who had proved (namely, six) were entitled to be notified. Accordingly he tendered 6*s.*, being the scale fee of 1*s.* for each creditor, but subsequently paid the further 13*s.* demanded under

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protest, and requested that the matter might be referred to the judge. (1)

Tindale Davis, for the bankrupt. Sect. 8 of the Bankruptcy Act, 1890, enacts that notice of the bankrupt's application for discharge is to be sent to "each creditor who has proved," and the scale of fees in table A prescribes a fee of 1*s.* for "each creditor to be notified." Table A and the section coincide and indicate a limitation in the creditors who are to receive notice. Therefore the words in the section that the Court may hear "any creditor" must be taken to mean "any creditor who has proved." Until a creditor has proved he has no locus standi. But r. 235 says the notice is to be sent to creditors "whether they have proved or not." That is inconsistent with the Act. The rule cannot control or supersede the Act, though it is part of the Act, but must be interpreted so as to be consistent with it. If it is inconsistent it must give way to the plain terms of the Act: *In re Davis* (2); *In re McHenry*. (3) Then the notice has to be sent in accordance with form 61 in the appendix, and that

(1) The Bankruptcy Act, 1890, enacts, s. 8: "(1.) A bankrupt may, at any time after being adjudged bankrupt, apply to the Court for an order of discharge and the Court shall appoint a day for hearing the application . . . .

"(6.) Notice of the appointment by the Court of the day for hearing the application for discharge shall be published in the prescribed manner and sent fourteen days at least before the day so appointed to each creditor who has proved, and the Court may hear the official receiver and the trustee and may also hear any creditor."

Rule 235 of the Bankruptcy Rules, 1886 and 1890, provides: "(1.) A bankrupt intending to apply for his discharge under section 8 of the Bankruptcy Act, 1890, shall produce to the registrar a certificate from the official receiver specifying the number of his creditors of whom the official receiver has notice (whether they have proved or not). The registrar shall, not less than twenty-eight days before the day appointed for hearing the application, give notice of the time and place of the hearing of the application to the official receiver and the trustee, and the official receiver shall forthwith send notice thereof to the Board of Trade for insertion in the *London Gazette*.

"(2.) Notice of the day appointed for the hearing of the debtor's application for discharge shall be sent by the official receiver to each creditor not less than fourteen days before the day so appointed. Such notice shall be in the Form 61 in the Appendix."

(2) (1872) L. R. 7 Ch. 526, 529.

(3) (1883) 22 Ch. D. 813, 815.

form has s. 8 of the Act of 1890 printed on the back of it. It is submitted that the rule is inconsistent and ultra vires and should be disregarded.

Hansell, for the official receiver. The rule is not inconsistent with the Act of Parliament. By s. 127 of the Act of 1883 the rules are to have effect as if enacted by the Act. Rule 235, therefore, is equivalent to a section of the Act—*Institute of Patent Agents* v. *Lockwood* (1)—and must be so construed with s. 8 that a meaning may be given to both of them. There is no repugnancy. The rule is wider in its operation and merely puts an additional burden on the bankrupt and requires that notice shall be given to the creditors whether they have proved or not. This has been the universal practice for many years.

Tindale Davis, in reply.

BIGHAM J. In this case the bankrupt, desiring to obtain his discharge, applied under the provisions of r. 235 of the Rules of 1886 and 1890, and for the purpose of complying with the provisions of that rule he produced to the registrar a certificate from the official receiver specifying the number of his creditors as nineteen. The certificate did not contain, and as I understand such a certificate never does contain, the names of the creditors or their addresses. It is sufficient if it contains the number. But the nineteen creditors who make up that number were scheduled by the bankrupt in his statement of affairs, together with their names and addresses and the amounts due to them, and therefore it must be taken, I think, that these are all real creditors. They are admitted to be so by the bankrupt. Now r. 235 provides that the registrar shall, if he has received the certificate from the official receiver specifying the number of the bankrupt's creditors, not less than twenty-eight days before the day appointed for hearing the application, give certain notices to the official receiver and to the trustee, and then the official receiver shall send a notice to the Board of Trade for insertion in the *Gazette*. The rule then goes on to provide that notices "of the day appointed shall be sent by the official receiver to each creditor not less than fourteen days

(1) [1894] A. C. 347.

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before the day so appointed," and that such notice shall be in the form 61 in the appendix, which form is as follows: "Take notice that the above-named bankrupt has applied to the Court for his discharge, and that the Court has fixed" a certain day for the hearing of the application. Then there is a note to the form that on the back of it the provisions of s. 8 (to which I shall refer in a minute or two) of the Act of 1890 shall be printed. Therefore what happened in this particular case was this. The bankrupt had obtained a certificate from the official receiver stating that his creditors were nineteen in number. The bankrupt had given previously, when he filed his statement of affairs, the names and addresses of those nineteen creditors, with the amount of the debts due to them, and it had become necessary in consequence of his application that sub-s. 2 of r. 235 should be complied with, namely, that notice of the day appointed for the hearing of his application for discharge should be sent by the official receiver to each creditor not less than fourteen days before the day so appointed. Now, in my opinion, if the matter stood there, it would be perfectly clear that the creditors to whom in this particular case notice would have to be sent would be the nineteen creditors whose names and addresses are to be found in the bankrupt's statement of affairs. It may be that it would be necessary to send the notices to other creditors as well, but I express no opinion as to that. I am only concerned with this particular case, and I am quite clear that under this r. 235, in the circumstances mentioned, it was necessary that the notices should be sent to the nineteen creditors. Now the bankrupt, asking for his discharge under this rule, has to pay certain fees, and those fees are specified in table A annexed to the Acts of 1883 and 1890. Table A was published on December 18, 1890, and provides that the bankrupt must pay "for each creditor to be notified" the sum of 1*s*. If I am right in saying that the creditors to be notified were all the nineteen, he had to pay 19*s*. He objected to paying 19*s*., and he said, "Only six of the nineteen creditors have proved. I admit"—for he had already admitted—"that the whole nineteen are in fact creditors, but only six have proved, and I claim that they are the only creditors to be notified within the

meaning of this requirement which calls upon me to pay 1*s.*" If the matter stood there, without reference to the Act of Parliament, I should say the bankrupt was obviously wrong, and that he must certainly pay 1*s.* in respect of each creditor who appears as such in his statement of affairs. But he says that by reason of sub-s. 6 of s. 8 of the Act of 1890 he is not liable to pay 1*s.* except in respect of the creditors who have proved. Now sub-s. 6 of s. 8 of the Act of 1890 provides as follows: "Notice of the appointment by the Court of the day for hearing the application for discharge shall be published in the prescribed manner"—that is in the *Gazette*—"and sent fourteen days at least before the day so appointed to each creditor who has proved." I need not go any further. The bankrupt says that is a statutory provision that the notice is to be sent to those creditors who have proved; and he says, with some reason, that the statute, pointing to creditors who have proved, must be taken to exclude creditors who have not proved. If the statute stood alone, I should think he was probably right; but then the statute does not stand alone, because, as I have said, the rule has been made, and the rule is, in my opinion, that the notice must be sent to each creditor, and certainly, as I have said before, to each person whom the debtor, the bankrupt, himself admits to be a creditor; and I do not think that the rule and the statute, which I think must be read as one, are necessarily inconsistent. The statute says the notice is to be sent to each creditor who has proved. The rule says the notice must be sent to each creditor, and, as I read it, whether he has proved or not. The two are not necessarily inconsistent, although, no doubt, according to my view, the rule makes the obligation as to these notices wider than the statute; but it is not inconsistent that the obligation should become wider than the statute that made it. The rule simply imposes, which I think it may lawfully do, a further burden upon the bankrupt. It imposes the burden of his paying the money and of seeing that the notices are sent out to all the creditors, and certainly, applying that to this particular case, to all those persons whom the bankrupt himself by his own act has admitted to be creditors. I do not feel that I can interfere with

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the practice which I understand has obtained in the Court for the last twenty years or more.

Solicitors: *Grimwood & White; Solicitor to the Board of Trade.*

H. L. F.

1909

Jan. 29.

JAMES *v.* MORGAN.

Bastardy—Agreement by Father to pay Mother for Maintenance of Bastard Child—Death of Mother—Right of Mother's Administrator to sue on Agreement.

By an agreement in writing the father of a bastard child agreed to pay to the mother a certain weekly sum until the child should attain a certain age, and in consideration of those payments the mother agreed not to apply to justices for a bastardy order and further agreed to maintain and bring up the child. On the death of the mother before the child had attained the stipulated age the father discontinued the payments. The administrator of the mother's estate brought an action against the father upon the agreement:—

Held, that the father's obligation came to an end with the mother's death and that the action would not lie.

APPEAL from Llandilo County Court.

By an agreement in writing dated December 4, 1903, made between Margaretta James, spinster, and John Thomas Morgan, assistant schoolmaster, after reciting that Margaretta James was on November 3 delivered of a bastard child of which John Thomas Morgan admitted he was the father, it was agreed as follows:

1. "The said John Thomas Morgan will pay to the said Margaretta James the sum of 3*s.* 6*d.* per week for the support and maintenance of such bastard child up to the age of fourteen years."

2. "In consideration of such payments the said Margaretta James agrees that she will not make any application to any Court of summary jurisdiction for an order for the maintenance of the said child."

3. "And the said Margaretta James hereby agrees to take charge of keep maintain and bring up the said child and to

make no claim whatever against the said John Thomas Morgan in respect of the maintenance education or bringing up of the said child."

Under that agreement Morgan continued to make the stipulated weekly payments down to May, 1905, when Margaretta James died. Morgan from that date discontinued the payments. The plaintiff, who was Margaretta James's father, and who upon her death had taken upon himself the custody and maintenance of the child, took out letters of administration to his daughter, and as her administrator brought this action in the county court to recover the sum of 24*l.* 3*s.* as arrears of maintenance due under the agreement. The county court judge held that the agreement came to an end with the death of Margaretta James and dismissed the action. The plaintiff appealed.

Davies Williams, for the plaintiff. The deceased woman's rights under the agreement survived to her administrator. The maintenance of the child by her was no part of the consideration for the payments by the defendant, for she was already, apart from any contract, bound at law to maintain it, and if that maintenance had purported to be the sole consideration for the promise to pay the agreement would have been nudum pactum: *Crowhurst* v. *Laverack*. (1) The contract may therefore be read as though the agreement to maintain were not included in it. The sole consideration for the payments was the abstaining by the mother from applying for an affiliation order. But that consideration was wholly executed, for after her death no application for an affiliation order could be made by any one, inasmuch as in such a proceeding the mother is a necessary witness: *Reg.* v. *Armitage*. (2) No proposition in law is clearer than that, as a general rule, the executor represents the person of his testator with respect to all his rights and liabilities upon all his contracts. To that general rule there are only two exceptions—one where the contract depends on personal skill, which is not the case here; the other where it was clearly the intention of the parties that the contract should only last during the life of the promisee; and no such intention can here be inferred. The

(1) (1852) 8 Ex. 208. (2) (1872) L. R. 7 Q. B. 773.

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only object of substituting the agreement for an affiliation order was to avoid, in the interests of the defendant, the publicity which an application to justices would involve. And if an order had been made, the defendant's liability would not have ceased with the woman's death; he would have had to go on paying the money, under s. 5 of 7 & 8 Vict. c. 101, to the guardian appointed by the justices, who in this case would presumably have been the plaintiff. It cannot have been intended that the defendant's liability under the agreement should last for any shorter period than under an order.

[WALTON J. If the plaintiff here were to recover, would he be under any obligation to apply the money to the maintenance of the child?]

Yes. Clause 3 of the agreement, whereby the mother promised to maintain the child, although an insufficient consideration to support the defendant's promise, was nevertheless binding on her and enforceable at the suit of the defendant. The obligation under that clause passed to the plaintiff as administrator.

No counsel appeared for the respondent.

BIGHAM J. I think this agreement is quite simple. The father of the child was anxious not to be brought before the magistrates under the Bastardy Acts and to be ordered to pay a sum of money for its maintenance. Under those circumstances he made a bargain with the mother, which was in substance to the effect that so long as she would keep and maintain the child and make no demands on him he would pay her 3*s.* 6*d.* a week. That was, in my opinion, a personal contract with the woman which she alone could carry out. It was she alone who could give that special care that the father was desirous that the child should have; and as upon her death that care which was part of the consideration for the payments could no longer be bestowed, the obligation to make those payments ceased also on her death. It was contended that the benefit of the contract passed to the mother's personal representative, and that the money, if paid to him, would have to be used for the purpose of maintaining the child. Indeed Mr. Williams went further and admitted that if the administrator had sufficient assets for

the purpose he would have to maintain and educate the child even though it cost much more than the 3*s.* 6*d.* that he received from the father. He was obliged to admit that, for the deceased's estate could not have the benefit of the contract without also accepting the burden, and the burden of the contract was to keep and maintain the child irrespectively of what it might cost to do so. This seems to me so absurd a conclusion that I cannot think it was intended that the contract should survive to the mother's representative. The contract provides in clause 1 that the father shall pay the mother 3*s.* 6*d.* a week for the support and maintenance of the child up to the age of fourteen years. The consideration for those payments is stated in the other two clauses. By clause 2 she agrees not to take bastardy proceedings against the father, and by clause 3 she agrees to keep and maintain the child. Those words shew that the agreement was intended to be operative only so long as the mother was in a position to give a mother's care and attention to its bringing up. Therefore as soon as the mother died the contract came to an end and the father's obligation to make the weekly payments ceased.

WALTON J. I agree. In my judgment when the mother and the defendant executed this agreement they were not contemplating the state of things which would arise in the event of her dying before the expiry of the fourteen years, and did not intend that the agreement should deal with anything that might happen after her death. What they were dealing with was the liability of the defendant during the mother's lifetime. The agreement provided that the defendant should pay a certain weekly sum for the child's maintenance in consideration of the mother doing two things—first, abstaining from taking proceedings for an affiliation order, and, secondly, maintaining the child. The object was to secure the defendant against an application for an affiliation order. But in order to ensure that he should have that immunity it was essential that the mother should perform both considerations; for even if she herself abstained from taking proceedings before the justices, if she failed to maintain the child, whereby it became chargeable to the parish during the

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Walton J.

lifetime of the mother, the parochial authorities would take them, whereas when once the mother was dead no application for an affiliation order could be made either by the mother's personal representative or by the parochial authorities. Having regard, therefore, to what was the main object of the agreement, I think it was only intended to be operative during the lifetime of the mother.

Appeal dismissed.

Solicitors for plaintiff: *H. W. Davies & Co., for C. R. Davies, Llandilo.*

J. F. C.

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Feb. 2.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* PRESTON.

Criminal Law—Evidence—Nature or Conduct of Defence—Imputation on Character of Witness for Prosecution—Cross-examination of Person charged—Criminal Evidence Act, 1898 (61 & 62 *Vict. c.* 36), *s.* 1, *sub-s.* (*f*) (ii.).

Upon the trial of an indictment for an offence one of the issues was whether the defendant was the man who was seen near the place where the offence was committed. Two witnesses identified the defendant at the police station as the man they had seen near the place, but a third person failed to identify him. With respect to this latter occasion the defendant in his evidence stated that the police inspector, who was present on the occasion and who gave evidence for the prosecution, said to the constable who was sent to bring the person in for the purpose of seeing whether he could identify the defendant, "the second," or something like it; that he (the defendant) was placed second from one end of a row of men; and that the person who was brought in did not pick him out, but picked out the man who was second from the other end. Counsel for the prosecution was then allowed to ask the defendant whether he had not been convicted on previous occasions. No reliance was placed upon the above evidence in support of the defence, nor was the defence conducted on the footing that the inspector's evidence ought not to be believed:—

Held, that the allegation of the defendant, so far as it reflected on the inspector, was made with reference to the conduct of the identification proceedings, which were relevant to the defence; that, though the identification on the particular occasion had failed, and therefore the allegation was not strictly relevant to the defence, it was natural for

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the defendant to make some comment on those proceedings; and that the nature or conduct of the defence was not such as to involve imputations on the character of the inspector within the meaning of s. 1, sub-s. (*f*) (ii.), of the Criminal Evidence Act, 1898, so as to allow the defendant to be cross-examined as to previous convictions.

APPEAL to the Court of Criminal Appeal against a conviction.

The appellant was indicted at the Worcestershire quarter sessions in the first count for breaking and entering a dwelling-house and stealing therein certain jewellery and other articles, and in the second count for receiving the articles well knowing them to have been stolen.

The evidence was to the effect that the wife of the prosecutor, who was the occupier of the house in question, went out during the afternoon, leaving the house locked up. When she returned later in the afternoon she found that the house had been broken into and the articles stolen. She and another witness gave evidence that they saw the appellant and another man in the neighbourhood of the house on that afternoon. Two days afterwards the appellant was arrested, and on him were found a handkerchief, a stud, and a pencil. The handkerchief was identified by the prosecutor and his wife by certain marks on it and by the way it was folded as belonging to the prosecutor; the stud, which was of a common kind sold for six a penny, was identified by them as belonging to their son by its being a little bent and rusty; and the pencil, which was an ordinary one, was identified by the prosecutor's wife as belonging to the son by its being bitten at the top. The appellant, who was called as a witness, stated in his evidence that these three articles were his property, and he gave the name of the shop where he bought the handkerchief. Evidence was given that when the appellant was at the police station he was placed in a row with a number of other men, and the prosecutor's wife and another witness identified him as the person whom they saw near the house on the day in question. A third person was also brought to the police station to see if he could identify the appellant as the man he had seen in the neighbourhood of the house, but he failed to do so and picked out another man instead. An inspector of police named Price was present at the police station

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when the last-mentioned person failed to identify the appellant, and he was called as a witness for the prosecution. The appellant, who was defended by counsel, gave evidence, and, when questioned in his examination in chief as to the occasions upon which he was brought up for identification, said, with regard to the third occasion above mentioned, "Inspector Price brought a man in to pick me out, and the man picked another man out. I was the second from one end, and the other man was the second from the other end, and Inspector Price sent a fellow out to fetch the man in, and he said deliberately 'the second,' and the man came in and pointed to the second and picked the other man out. I was second from the other end, not that end." In cross-examination he was questioned with respect to this incident, the following being the questions and answers:—"Q. Then there was a third man called. Was Inspector Price present? A. Inspector Price was present on that occasion. Q. What did Inspector Price say to the other man? A. Inspector Price stopped in the place, and when he sent a constable out he said something about 'the second.' I was the second from one end of the line, and I took it from that, and I said to the fellow 'You have heard that man say "the second,"' and the fellow said 'Yes.' I said 'I know the man will pick me out.' Q. Why? A. Because he was told the second. Q. Inspector Price told the man he was to pick out the second? A. He told the constable to tell him, and he came and picked the second man out. Q. Would that be an honest way of conducting a case if that were true? A. It is not an honest case at all. It is a got up affair."

Counsel for the prosecution thereupon proposed to ask the appellant questions whether he had not been previously convicted, upon the ground that the evidence given by him involved an imputation on the character of the police inspector, who was a witness for the prosecution, within the meaning of s. 1 of the Criminal Evidence Act, 1898. (1) The questions were objected to,

(1) Criminal Evidence Act, 1898 (61 & 62 Vict. c. 36), s. 1: "Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person. Provided as follows:— . . . . (*f*) A person charged and called as a witness in pursuance of

but the chairman allowed them to be put. Several previous convictions were then put to the appellant and were admitted by him. Subsequently, after he had been re-examined, the appellant, in answer to questions put to him by the chairman with regard to what took place when he was put up for identification, said that he could not quite distinctly say what Inspector Price said to the constable, but that it sounded something like "second," and that Price did not say anything to the man whom the constable brought in and who pointed out the second man from the other end. The following questions were then put to the appellant by the chairman, and the following answers were given :— "Q. What do you mean us to understand by what you say Inspector Price said to the constable? It is a very serious matter. You have told us that you heard Inspector Price say to the constable something which sounded like 'second.' You then say a man was brought in; Inspector Price did not speak to him, but this man at once pointed out the second man from the other end from where you were. What do you mean us to understand by what you say Inspector Price said? A. I do not wish you to understand anything, but it seems very funny when the man picked the man out from the other end. I was the second from one end, and he picked out the second from the other end. Q. That will hardly do. You have made a serious charge against Inspector Price by what you have said here, because, if it is true that Inspector Price said anything to the constable for the constable to repeat, a more serious offence a police officer could hardly be guilty of. That is why I want to understand what your words mean. A. I do not wish them to mean that. The constable was passing him, and he said 'Fetch him in'; and then something was said about 'second.' Perhaps he meant 'Fetch

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this Act shall not be asked, and if asked shall not be required to answer, any question tending to shew that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless . . . . (ii.) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution . . . ."

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him in this second.' When the man came in he picked out the second man from the other end, and it seemed very funny to me."

The above piece of evidence given by the appellant as to Inspector Price was not further referred to, and no reliance was placed upon it by the appellant's counsel in his defence. The jury found the appellant not guilty on the first count, but guilty on the second count of receiving the handkerchief, the stud, and the pencil, and he was sentenced to twelve months' hard labour.

Harold Hardy, for the appellant. One of the issues in the case was the question whether the appellant was the man who was seen near the house in question on the afternoon of the day on which it was broken into. The appellant was entitled to give evidence as to the manner in which the arrangements for his identification were conducted. In giving evidence as to what occurred when he was brought up for identification he was merely referring to an incident that he thought had occurred. The proceedings for identifying a prisoner at a police station are under the control of the police, and a prisoner is not represented when he is brought up for identification. It is therefore most important in his interest that he should be entitled to state fully what occurs on such an occasion without being subject to the risk of having his past character laid bare before the jury. The intent with which the incident was introduced must be looked at, and there was no intention here to make an attack on the character of the inspector independently of and outside the defence: *Rex* v. *Bridgwater*. (1) In his cross-examination the appellant was asked to express an opinion upon the incident, and he stated what he thought, but that is a very different thing from making a gratuitous aspersion on the character of the inspector. No reliance was placed upon this piece of evidence for the defence, and the "nature or conduct of the defence" was not such as to involve imputations on the character of a witness for the prosecution within the meaning of s. 1, sub-s. (*f*) (ii.), of the Criminal Evidence Act, 1898, so as to make the questions as to previous convictions admissible. The evidence,

(1) [1905] 1 K. B. 131.

therefore, was not admissible, and as it may have had a serious effect upon the minds of the jury, there was a substantial miscarriage of justice, and the conviction ought to be quashed. [He also referred to *Rex* v. *Rouse*. (1)]

Graham Milward, for the prosecution. The evidence given by the appellant as to the remark alleged to have been made by the inspector was not relevant to his defence. The man who had been brought in on that occasion had failed to identify the appellant, and therefore the case against the appellant so far failed. There was no need further to refer to it, and yet the appellant brought in the charge against the inspector. The evidence was quite irrelevant and outside the defence altogether. It was introduced for the purpose of making a gratuitous attack upon the inspector, with the object of weakening his evidence in other respects. "The nature of the defence" involved an imputation on the character of the inspector within the meaning of s. 1, sub-s. (*f*) (ii.), of the Criminal Evidence Act, 1898, and the questions as to the previous convictions were therefore admissible. In *Rex* v. *Rouse* (1) the prisoner merely denied with emphasis in cross-examination a statement made by the prosecutor. In *Rex* v. *Bridgwater* (2) there was no imputation on the character of the police sergeant. The prisoner only said that he was working under instructions from the police sergeant. It is part of a detective's ordinary duty to get into touch with criminals and to use them for the purpose of detecting crime. In *Rex* v. *Sheean* (3) it was held by Jelf J., on circuit, that a statement in evidence by the prisoner, who was charged with rape, that the prosecutrix was a consenting party was a defence to the charge and did not authorize the prosecution to cross-examine the prisoner as to his previous convictions. In the present case the statement made by the appellant as to the conduct of the inspector was not relevant to his defence, and the questions as to previous convictions therefore were properly admitted.

Hardy, in reply. In *Rex* v. *Bridgwater* (2) the evidence given by the prisoner clearly cast an imputation on the character of a witness for the prosecution, and yet the Court held that the

(1) [1904] 1 K. B. 184. (2) [1905] 1 K. B. 131.
(3) (1908 24 Times L. R. 459.

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questions as to a previous conviction were not admissible, inasmuch as the evidence was relevant to his defence.

The judgment of the COURT (Lord Alverstone C.J., Channell and Walton JJ.) was delivered by

CHANNELL J. These cases as to the admissibility in the cross-examination of a prisoner who gives evidence on his own behalf of questions as to his character and whether he has been previously convicted are very often somewhat difficult to deal with at the trial, and the present case is an illustration of that difficulty, as it is very near the line. Counsel who have argued the case before us have directed their attention to what seems to us to be the true principle which should govern these cases. That principle has been laid down quite clearly by the Lord Chief Justice in *Rex* v. *Bridgwater* (1) in a passage which, though stated with reference to the particular facts of that case, does in truth lay down a general rule upon the matter. The Lord Chief Justice says: "It seems to me on the whole statement the prisoner's counsel by his questions to Moss was not doing more than developing his defence that the prisoner believed that he was acting under Moss's directions, and seeking to substantiate that defence by means of admissions from Moss. If the questions put to Moss had involved the imputation that he was guilty of misconduct independently of the defence, or of the necessity for developing the defence, different considerations might arise, for the questions might then perhaps be construed as an attack on the prosecutor's general character." That seems to us to explain the principle upon which evidence such as was admitted in the present case is admissible.

Now the section under which the question arises is s. 1, sub-s. (*f*), of the Criminal Evidence Act, 1898. That section enacts that "a person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to shew that he has committed or been convicted of or been charged with any offence other than that wherewith he is then charged, or is of bad character, unless . . . . (ii.) he has personally or by his advocate

(1) [1905] 1 K. B. 131, at p. 134.

asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character"—so far that is merely a statement of the old law upon the point—"or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution." The latter part of the section is that which it is material to consider in the present case. It appears to us to mean this: that if the defence is so conducted, or the nature of the defence is such, as to involve the proposition that the jury ought not to believe the prosecutor or one of the witnesses for the prosecution upon the ground that his conduct—not his evidence in the case, but his conduct outside the evidence given by him—makes him an unreliable witness, then the jury ought also to know the character of the prisoner who either gives that evidence or makes that charge, and it then becomes admissible to cross-examine the prisoner as to his antecedents and character with the view of shewing that he has such a bad character that the jury ought not to rely upon his evidence. That is the general nature of the enactment and the general principle underlying it. The present case obviously is very near the line. The case against the prisoner was a comparatively weak one. It rested mainly upon the identification of three small articles which were found upon him. One of those articles was a handkerchief, which by reason of certain marks upon it might be said to be fairly capable of identification, though the marks might also be fairly explainable by the prisoner. The other two articles were not very capable of identification, but having been identified, their identification might be used as corroborative evidence of the case for the prosecution. Upon the whole there was a comparatively slight case against the prisoner. When, however, the questions as to his previous convictions were put to him, and he had to admit their truth, the result was absolutely fatal. Therefore, if the evidence as to the previous convictions was not admissible, inasmuch as it is obvious that the conviction was brought about by that evidence, the conviction must be quashed. The prisoner was defended by counsel, and the defence was not conducted upon the footing that the police inspector who was called for the prosecution was a witness

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of such a character that he ought not to be believed, nor did the nature of the defence involve that. But in the course of the prisoner's evidence he did say something as to the police inspector which no doubt involved a suggestion of improper conduct on the part of the inspector, namely, that he had conducted the arrangements for identification in an unfair way. That was, no doubt, a serious imputation upon the conduct of a man holding the position of inspector of police. But the allegation was made with reference to a matter which could not be said to be irrelevant. The prisoner was almost bound to give some evidence upon the subject of his identification at the police station. It may be said that, if the matter is looked at carefully and in a strictly logical manner, there was no real ground for bringing in that complaint against the police inspector, except to discredit him, because the identification upon the occasion in question had failed, and that, therefore, even if it would have been relevant to the defence where the identification was successful, it ceased to be relevant where the identification had failed, and could only have been relevant as conveying an imputation on the character of the inspector. The answer to that is this: that the making of such an imputation was not in any way the substance of the defence; it was not part of the nature or conduct of the defence; and the observation was made upon a matter which, whether it was judicious to introduce it or not, rendered it natural for the prisoner to make it. It seems to us that s. 1 of the Criminal Evidence Act, 1898, was not intended in a case like this to impose upon a prisoner such a penalty as the exposure to the jury of his previous character when he, without consideration but not unnaturally, because it is connected with relevant matter, makes such a statement merely because upon careful examination one sees that the only real bearing it can have is to make an imputation on the character of a witness for the prosecution. The statement in the present case was a mere unconsidered remark made by the prisoner without giving any serious attention to it, and in our opinion it does not come within s. 1, sub-s. (*f*) (ii.), of the Act as being an imputation made upon the character of a witness for the prosecution for the purpose of discrediting his testimony. If that were the nature of the

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imputation the prisoner could be cross-examined as to his character. The present case, as I have said, is very near the line, and with some hesitation we have come to the conclusion that the evidence as to the previous convictions, without which the prisoner would probably not have been convicted, ought not to have been admitted, and that the conviction must be quashed.

With regard to the decision of Jelf J. in *Rex* v. *Sheean* (1), we desire to express no opinion upon that case and to leave it open for future consideration, as there are special considerations applicable to a charge of rape.

Conviction quashed.

Solicitor for appellant: *Registrar of the Court of Criminal Appeal.*

Solicitor for prosecution: *Director of Public Prosecutions.*

W. F. B.

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Jan. 12, 13; *Feb.* 3.

Limitation of Time—Action on Bond—Acknowledgment in writing—Executor of Deceased Obligor—Joint and several Liability—Acknowledgment by Executor—"Party liable by virtue of such Specialty"—Lost Acknowledgment—Parol Evidence—Civil Procedure Act, 1833 (3 & 4 *Will.* 4, c. 42), *ss.* 3, 5.

The obligors of a bond bound themselves to pay the principal debt and interest thereon in these terms: "For which payment to be well and truly made we bind ourselves and each of us and the heirs, executors, and administrators of us and each of us and every of them jointly and severally":—

Held, that the executor of a deceased obligor was not thereby made jointly liable with the surviving obligors.

An acknowledgment in writing signed by the executor of a deceased obligor, who was at the date of his death jointly and severally liable with other obligors on a bond, is an acknowledgment of the several liability of the deceased obligor and not of the joint liability of the surviving obligors, and is not therefore as against the surviving obligors an acknowledgment by a party liable by virtue of the specialty within the meaning of s. 5 of the Civil Procedure Act, 1833, as interpreted by

(1) 24 Times L. R. 459.

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Roddam v. *Morley*, (1857) 1 De G. & J. 1, so as to take out of the operation of s. 3 of the Act an action founded on the joint liability of the surviving obligors.

Parol evidence is admissible to prove the contents of a written acknowledgment which has been lost.

TRIAL of action before Channell J. without a jury.

The action was brought by Elizabeth Read and Edward Adolphus Buchanan as the representatives of John Augustus Read, deceased, against Frederick George Hilton Price and Sheldon Dudley Driver to recover a principal sum and interest upon a bond.

The bond was dated January 28, 1879, and by its terms Vincent Bailey, Frederick George Hilton Price, Sheldon Dudley Driver, John George Sebright, and Ernest Ibbotson were held and firmly bound unto John Augustus Read in the sum of 2000*l.* to be paid to the said John Augustus Read, his executors, administrators, and assigns. Then followed these words: "for which payment to be well and truly made we bind ourselves and each of us and the heirs executors and administrators of us and each of us and of every of them jointly and severally by these presents.

"Now the condition of the above written bond or obligation is such that if the said Vincent Bailey his heirs executors or administrators shall pay or cause to be paid to the said John Augustus Read his executors administrators or assigns the sum of one thousand pounds on June 27, 1881, together with interest thereon in the meantime at the rate of ten pounds per cent. per annum by half-yearly payments on December 27 and June 27 in each year then the above-written bond or obligation shall be void otherwise the same shall be and remain in full force and virtue.

"And it is hereby declared that each of the said obligors shall be held and deemed to be principals as regards the obligee so that if time for payment of principal or interest shall be given to the principal by the obligee it shall not discharge them or either of them."

Vincent Bailey was in fact the principal debtor, and the defendants and the other obligors were his sureties. Of these

sureties one had become bankrupt some time before the writ was issued and was not concerned in this action; another was in the year 1884 released by a deed with the assent of all the parties interested. John Augustus Read died on June 21, 1888, having by his will appointed the plaintiffs executrix and executor, the plaintiff Elizabeth Read, his widow, being the person beneficially entitled to the principal sum and interest on the bond.

The parties remaining liable on the bond being Bailey, as principal debtor, and the defendants, as his sureties, the former paid interest to Mrs. Read down to June 28, 1905. The half-year's interest due at Christmas, 1905, was not paid, and Bailey died on January 26, 1906. His estate was then found to be insolvent. His executor acknowledged the debt in two affidavits, one made for the purposes of probate and the other in an administration action in the Chancery Division.

The writ in this action was issued on March 10, 1908, against Price and Driver to recover the principal sum and interest. The defendants pleaded that the action accrued more than twenty years before the issue of the writ and was barred by s. 3 of the Civil Procedure Act, 1833. (1) The plaintiffs in reply relied upon

(1) Civil Procedure Act, 1833 (3 & 4 Will. 4, c. 42), s. 3: "All actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or scire facias upon any recognizance . . . . that shall be sued or brought at any time after the end of the present session of Parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon an indenture of demise, or covenant or debt upon any bond or other specialty, actions of debt or scire facias upon recognizance, within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after . . . ." Sect. 5: "Provided always, that if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty, or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid and so acknowledged to be due within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid, ... and the plaintiff or plaintiffs in any such action, on any indenture, specialty, or recognizance, may, by way of replication, state such acknowledgment, and that such

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the acknowledgments given by Bailey's executor as aforesaid as operating by virtue of s. 5 of the Act to keep the right of action alive.

It appeared, however, at the trial that the payments made as aforesaid to Mrs. Read by Bailey in his lifetime had always been made by cheques enclosed in letters. Mrs. Read in her evidence stated that she generally, if not always, found it necessary to apply twice for payment of the interest, and that she constantly received letters from Bailey excusing delay in payment and containing promises to pay in a week or a fortnight or within some other period, as the case might be; that these letters contained acknowledgments, the precise words of which Mrs. Read did not profess to remember, that the bond was in existence; these letters did not always refer to the bond, but always referred to the interest. Mrs. Read stated that she never kept letters and had destroyed these letters, being under the impression that if she kept the bond in her possession and got payment of the interest the principal sum was safe.

In view of this evidence counsel for the plaintiffs asked for and obtained leave at the hearing to amend the reply so as to enable them to rely on these letters of Bailey as acknowledgments in writing of the bond debt made within twenty years of the date of the writ in the action.

Boxall, K.C., and *E. E. Humphrys*, for the plaintiffs. First, the plaintiffs are entitled to recover without any amendment of

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action was brought within the time aforesaid, in answer to a plea of this statute."

Mercantile Law Amendment Act, 1856 (19 & 20 Vict. c. 97), s. 14: "In reference to the provisions of the Acts of the twenty-first year of the reign of King James the First, chapter sixteen, section three, and of the Act of the third and fourth years of the reign of King William the Fourth, chapter forty-two, section three, and of the Act of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, section twenty, when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any contractor, no such co-contractor or co-debtor, executor, or administrator, shall lose the benefit of the said enactments, or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest, or other money, by any other or others of such co-contractors or co-debtors, executors, or administrators."

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the reply. By s. 3 of the Civil Procedure Act, 1833, an action of debt upon any bond or other specialty must be commenced within twenty years after the cause of action. By s. 5 of the same Act it is provided that, if any acknowledgment shall have been made either by writing signed by the party liable by virtue of the specialty or his agent or by part payment or part satisfaction on account of any principal or interest due thereon, the person entitled to the action may bring his action for the money remaining unpaid and so acknowledged to be due within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid. The words "the party liable by virtue of such specialty" have been held to mean the party or parties liable by virtue of such specialty or any of them: *Roddam* v. *Morley*. (1) It is true that doubt was thrown on that case in *Dickenson* v. *Teasdale* (2) and in *Coope* v. *Cresswell* (3), but it has been approved and affirmed in the Court of Appeal in *In re Lacey*, *Howard* v. *Lightfoot* (4), and must now be taken to be established. By s. 14 of the Mercantile Law Amendment Act, 1856, no co-contractor or co-debtor bound or liable jointly only or jointly and severally is to lose the benefit of the Civil Procedure Act, 1833, by reason only of payment of any principal, interest, or other money by any of his co-contractors or co-debtors; but an acknowledgment made by writing signed by a party liable by virtue of the specialty retains its original force and effect under s. 5 of the Civil Procedure Act, 1833. The affidavits by Bailey's executor are sufficient acknowledgments made by writing within the meaning of this section: *Moodie* v. *Bannister* (5); *In re Emmett*, *Jenkins* v. *Emmett* (6); Darby and Bosanquet, Statutes of Limitation, 2nd ed. p. 155; and they were signed by a party liable by virtue of the bond.

Secondly, if the affidavits by Bailey's executor were not sufficient to take the case out of s. 3 of the Civil Procedure Act, 1833, the letters written by Bailey himself contained sufficient acknowledgments. They have, no doubt, been lost, but the

(1) (1857) 1 De G. & J. 1.
(2) (1862) 1 D. J. & S. 52.
(3) (1866) L. R. 2 Ch. 112.
(4) [1907] 1 Ch. 330.
(5) (1859) 4 Drew. 432.
(6) (1906) 95 L. T. 755.

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ordinary rules of evidence apply to them and secondary evidence is admissible to prove their contents.

[CHANNELL J. referred to *Dugdale* v. *Vize* (1) and *Hanan* v. *Power*. (2)]

The evidence is that they contained acknowledgments that the bond was in existence and the debt thereon unpaid, and these acknowledgments were made within twenty years before the commencement of this action by writing signed by Bailey, who was a party jointly liable with the defendants by virtue of the specialty.

C. A. Russell, K.C., and *Rayner Goddard*, for the defendants. An acknowledgment by an executor of a deceased obligor who was at the date of his death jointly liable with other obligors is not, as against the surviving joint obligors, an acknowledgment by a party liable by virtue of the specialty within the meaning of s. 5 of the Civil Procedure Act, 1833, as interpreted by *Roddam* v. *Morley*. (3) To keep a debt alive the acknowledgment must be an acknowledgment of that debt and not of another and a different debt. This bond contains a joint liability and five several liabilities; an acknowledgment of one of the several liabilities will not keep alive the joint liability. From the fact that two several liabilities are written upon the same skin of parchment it does not follow that an acknowledgment of one of them keeps the other alive. In the present case the joint debt of the defendants is being sued upon; but the debt acknowledged is the separate debt of Bailey, the only debt on which his estate was liable, because the joint liability did not devolve upon his estate, but passed to the defendants, the surviving joint debtors. Bailey's estate was never liable for the joint debt, and therefore the acknowledgment by his executor does not touch or concern that debt. This point is in principle concluded in the defendants' favour by the decision in *Slater* v. *Lawson*. (4)

The special wording of this bond has not the effect of making the executor of Bailey jointly liable with the defendants, because no one can make another a debtor, whether jointly with third persons or otherwise, without his consent.

(1) (1843) 5 Ir. Law Rep. 568.

(2) (1845) 8 Ir. Law Rep. 505. See also *Haydon* v. *Williams*, (1830) 7 Bing. 163.

(3) 1 De G. & J. 1.

(4) (1830) 1 B. & Ad. 396.

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With regard to the letters written by Bailey, parol evidence of their contents should not be admitted. To admit such evidence is to defeat the intention of the Legislature, which is that the acknowledgment shall be written and not merely verbal. In this case the evidence, even if admissible, is not sufficient to establish an acknowledgment that the bond debt was still due and owing. Moreover, the letters were sent with the cheques; they relate solely to and are merely part of and incidental to the payments, and cannot therefore have any greater force or effect than the payments themselves, which by s. 14 of the Mercantile Law Amendment Act, 1856, are ineffectual against co-debtors.

Boxall, K.C., in reply. The special wording of this bond makes the executor of Bailey liable jointly with the defendants, and therefore his acknowledgments bind them: *Whitcomb* v. *Whiting*. (1)

Cur. adv. vult.

Feb. 3. CHANNELL J. It is clear that as against the estate of Bailey this bond debt was kept alive by the acknowledgments made by his executor in the two affidavits sworn by him, one for the purposes of probate and the other in the administration suit. The debt had clearly been kept alive by Bailey as against himself, and the acknowledgment by his executor was a matter of course. Those affidavits, if made by the party liable by virtue of the bond, would operate as effective acknowledgments under s. 5 of the Civil Procedure Act, 1833, because under that Act it is not necessary that an acknowledgment should import a promise to pay. With regard to acknowledgments by payment and the effect of payment by one co-debtor upon the liability of the others, those matters are dealt with by s. 14 of the Mercantile Law Amendment Act, 1856; acknowledgments by writing, however, remain as they were under s. 5 of the Civil Procedure Act, 1833.

The difficulty in the construction of this enactment arises from the fact that it only speaks in the singular number of "the party liable by virtue of the specialty," and does not deal expressly with the case of more than one person being liable by

(1) (1781) 2 Doug. 652.

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virtue thereof; this difficulty led to the case of *Roddam* v. *Morley* (1), where the question was whether the payment of interest on a bond by the tenant for life of the real estate of the obligor was as against those in remainder an acknowledgment by the party liable by virtue of the specialty. It was held that an acknowledgment made by writing signed by "the party liable by virtue of such indenture, specialty, or recognizance, or his agent," meant an acknowledgment made by writing signed "by the party or parties liable by virtue of such indenture, &c., or any of them, or his, her, or their agent." The case arose in the Court of Chancery before Lord Cranworth L.C. on appeal from Wood V.-C. (2), and under the procedure that was adopted in those days two common law judges were invited to sit with the Lord Chancellor and give their opinion upon the matter. A very elaborate opinion was given by Williams and Crowder JJ. and an exhaustive judgment by the Lord Chancellor dealing with the effect of the statute when more than one person is liable by virtue of the specialty. The case was afterwards considered, slightly by Lord Westbury L.C. in *Dickenson* v. *Teasdale* (3), and more seriously by Lord Chelmsford L.C. in *Coope* v. *Cresswell* (4), in both of which cases some slight doubt was thrown both upon the decision and upon the reasoning in *Roddam* v. *Morley* (1); but the profession generally appeared satisfied that the decision and reasoning of that case were sound. The text-books asserted them to be so. In the first edition of Darby and Bosanquet on the Statutes of Limitation the learned authors expressed a confident opinion that *Roddam* v. *Morley* (1) would eventually be affirmed, and in each subsequent edition they have been able to quote successive cases in which numerous judges have indicated the same opinion (see 2nd ed. p. 159 and supplement to 2nd ed. p. 8); and if they should publish another edition they will be able to say that the matter is now concluded by the decision of the Court of Appeal in *In re Lacey, Howard* v. *Lightfoot* (5), where the question was fully discussed, and where the Court ultimately adopted not

(1) 1 De G. & J. 1.
(2) (1856) 2 K. & J. 336.
(3) 1 D. J. & S. 52.
(4) L. R. 2 Ch. 112.
(5) [1907] 1 Ch. 330.

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merely the actual decision but the whole reasoning of *Roddam* v. *Morley* (1); and it must now be taken that that case establishes the meaning of the enactment in all cases where more persons than one are liable by virtue of the specialty. The words of the learned judges in *Roddam* v. *Morley* (1) have been adopted in a work of considerable authority, namely, Sugden's Real Property Statutes (see p. 149), as explaining the statute in this way: "The words, 'the party liable, or his agent,' are to be read as if they were 'the party or parties liable by virtue of the bond, &c., or any of them, or his, her, or their agent.'" Sect. 5 of the Civil Procedure Act, 1833, must now therefore be taken to run, "provided that if any acknowledgment shall have been made either by writing signed by the party or parties liable by virtue of such indenture, specialty, or recognizance, or any of them, or his, her, or their agent . . . . it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid and so acknowledged to be due within twenty years after such acknowledgment by writing . . . ."

In the case, therefore, of several persons jointly liable on a bond what is necessary to take the case out of the limitation imposed by the Act is an acknowledgment in writing signed by the party or parties liable by virtue of the bond or any of them. That raises the question whether these acknowledgments by the executor of Bailey, a deceased obligor, which, as I have said, would be effective to keep the debt alive against Bailey's estate, are sufficient to take the case out of the statute as against the two surviving joint obligors. In my opinion they are not, because I think the words "parties liable by virtue of the specialty"—in this case a bond—mean parties liable by virtue of the joint bond. Assuming for a moment that this was the case of a joint and several bond in the common form binding on the executors of a deceased obligor because the obligation is several as well as joint, there can be no doubt that as far as the deceased obligor is concerned the joint obligation ceases on his death. I think that follows from the decision in *Slater* v. *Lawson* (2), a case decided on the Limitation Act, 1623 (21 Jac. 1, c. 16). In that case the defendant was one of two joint and several

(1) 1 De G. & J. 1. (2) 1 B. & Ad. 396.

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makers of a promissory note; the other had died, and his executrix had paid interest on the note; but it was held that that was not sufficient to keep alive the joint liability. It is true that the debt in that case was a simple contract and not a specialty debt, and that the statute in question was the Limitation Act, 1623, and not the Civil Procedure Act, 1833, but for this purpose I see no material difference between the two statutes. It seems to me to follow from that case that though the executor of Bailey was in a sense liable by virtue of the bond, yet, his liability being only by reason of the several obligations of the bond, he was not a party liable by virtue of the joint bond and his acknowledgment does not affect the joint obligation. This would in my judgment be the result if the bond were an ordinary joint and several bond in the common form.

The plaintiffs, however, rely on the special and particular words of this bond, which are as follows: "we bind ourselves and each of us and the heirs executors and administrators of us and each of us and of every of them jointly and severally by these presents."

Now those words purport, no doubt, to bind all the surviving debtors and the executors and administrators of deceased debtors in every way possible; as to the several liabilities there is no difficulty; but how can a man make his executor liable jointly with another? How can a person without his consent be made liable jointly with others for the payment of future sums? The difference between joint liability and several liability is that the latter devolves upon the executor of the debtor, while the former does not, but passes by survivorship to the surviving joint debtors. If all the obligors should die, would all their executors be jointly liable? That would do away with the survivorship of the joint liability. Therefore it seems to me that though the words of this bond shew the strongest intention to bind everybody that can be bound, yet the way in which executors are intended to be bound, and the only way in which they can be bound, is by the several liability. Accordingly for the purposes of this case there is no material distinction between the wording of this bond and that of a bond which makes the obligors jointly and severally liable in the common form. In the case of debtors

jointly and severally liable it has been held that a payment of interest by the executor of a deceased debtor must be taken as made in respect of the several but not of the joint liability: *Slater* v. *Lawson*. (1) It seems to me to follow that the question whether, according to the interpretation given to s. 5 of the Civil Procedure Act, 1833, in *Roddam* v. *Morley* (2), the acknowledgments by the executor of Bailey were acknowledgments by a party or parties liable by virtue of the bond, or any of them, must be answered in the negative, because although the executor of Bailey was a person liable on this bond he was liable only in respect of the several liability of his testator, and although his affidavits were acknowledgments of that liability they were no acknowledgment of the joint liability of the surviving joint obligors, the present defendants. They were merely acknowledgments of another and a distinct liability by a party liable thereto, but not subject to any joint liability, by virtue of the bond. Therefore I think that the case put forward in the original reply fails.

I come now to the case raised by the amended reply. It appeared at the trial that the payments of interest made by Bailey himself in his lifetime were always accompanied by letters. Now it is obvious that, if these letters in fact contained acknowledgments of the debt, they were acknowledgments in writing signed by a party liable jointly with the defendants by virtue of the bond. Accordingly the plaintiffs desired leave to amend their reply and to rely upon those letters as acknowledgments. I thought it right to allow them to raise that contention, and I decided to allow the amendment, reserving all questions as to costs. Now I think it inevitable that those letters must have contained an acknowledgment that the bond was still in existence and that the money due on it had not been paid; it could hardly be otherwise. The letters have been destroyed, and the question is whether I ought to admit secondary evidence of their contents. It is said that to do so would be to depart from the enactment, which directs that the acknowledgment must be in writing and signed by a party liable by virtue of the bond, and that to allow parol evidence to be given of a non-existing document is in point

(1) 1 B. & Ad. 396. (2) 1 De G. & J. 1.

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of fact to defeat the intention of the statute, which is that a parol acknowledgment should not be sufficient, but that a writing should be necessary. No doubt that is the intention of the statute, but I think that the ordinary rules of evidence as to the existence and contents of written documents must be applied to acknowledgments in writing, and that if they are proved to have been destroyed the Court may admit secondary evidence of them, notwithstanding that to do so may appear to a certain extent to be evading the policy of the statute. No doubt in the great majority of cases the judge who has to decide on the admissibility of the evidence should carefully scrutinize any evidence tendered of an acknowledgment which does not exist and cannot be produced. The case is somewhat analogous to that of a claim brought against the estate of a deceased person which is often not allowed unless supported by corroborative evidence; that is not a positive rule, but is rather the effect and outcome of the careful scrutiny to which such claims are submitted. But, making allowance for those considerations, I think there cannot be any doubt that the cheques were sent in letters which in point of fact contained acknowledgments as Mrs. Read says they did.

Next it was contended by the defendants that these letters were not written with any intention of acknowledging the existence of the bond, but were simply the means by which payment was made, and, being merely incidental to the payment of the cheques, cannot have any greater force or effect than the payments themselves. That is an argument which must be considered. It must be remembered that for the purposes of s. 5 of the Civil Procedure Act, 1833, it is not necessary that the acknowledgment should import a promise to pay the debt. Moreover, as was said by Lord Cranworth L.C. in *Roddam* v. *Morley* (1), the effect of this statute is a matter of positive law. It is not material to consider whether on the one hand it is right or fair that the defendant should have the protection he claims, or on the other hand that the plaintiff should be able to defeat that protection. The only question for the Court is whether the case comes within the words of the enactment. If it comes within the words

(1) 1 De G. & J. 1, at p. 23.

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relating to the limitation, the defendant is entitled to the benefit of the statute; if it comes within the words relating to acknowledgments, then the plaintiff is entitled to the benefit of it. The words of the statute are all that the Court has to consider. This is the point which gave me most trouble during the argument, because it arose upon and out of the amendment to the reply, and I felt that by allowing that amendment at a very late stage in the proceedings I had in a sense deprived myself of the benefit of the argument which counsel for the defendants might have addressed to me if they had had more time to consider the point, and I therefore reserved judgment in order to see whether further authority on the question was to be found. I have failed to find any authority other than the case of *Cockrill* v. *Sparkes* (1), if indeed that can be considered an authority on the point. That was an action on a joint and several promissory note made by one Hilder, a principal debtor, and his surety, who was the defendant, and dated more than six years before the commencement of the action. Within six years of the action the principal debtor became insolvent and executed an assignment for the benefit of his creditors. The defendant wrote and signed a letter to the plaintiff in these terms: "I consent to your receiving a dividend under Hilder's assignment, and I do agree that your so doing shall not prejudice your claim on me for the same debt." The plaintiff then received a dividend from Hilder's assignee and sued the defendant for the balance of the debt on the promissory note. It was held after argument that the letter was not an acknowledgment, because the case fell under the statute of 21 Jac. 1, c. 16, and to have the effect of an acknowledgment under that Act the letter must be one from which a promise to pay the debt might reasonably be implied. Then it was held that the payment of the dividend together with the letter relating thereto amounted to no more than payment by a co-debtor within s. 14 of the Mercantile Law Amendment Act, 1856, and that the defendant was therefore entitled to the benefit of the Statute of Limitations. But in the view I take of that case, if the letter had been a sufficient acknowledgment, it would have taken the case out of the statute even though it related merely to the

(1) (1863) 1 H. & C. 699.

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payment and was written with no intention of acknowledging the debt, but merely to prevent any release of the defendant as surety which might otherwise have followed by reason of the creditor receiving a dividend from the principal debtor and discharging him from the residue. The effect which payment by a party liable formerly had in keeping the debt alive against other parties has been done away with by the Mercantile Law Amendment Act, 1856; but the effect of an acknowledgment by writing signed by a party liable has been left untouched by the Legislature. The result of this is that, if there has come into existence an acknowledgment in writing signed by one of the parties liable by virtue of the bond, his co-debtors on the bond lose by force of the statute the benefit of the limitation; and this seems to me to be so even though the acknowledgment may have come into existence accidentally and without the intention of the party making it, and even though the writing may have been intended merely, as these letters were, to have reference to a payment which is being made and which of itself would not avail to keep the debt alive against co-debtors.

I come, therefore, to the conclusion that there were written acknowledgments within the period of twenty years before the commencement of this action made by Bailey himself, who was when he made them jointly liable with the defendants, and therefore a party liable by virtue of the specialty within the meaning of s. 5 of the Civil Procedure Act, 1833, as interpreted by *Roddam* v. *Morley* (1); and consequently that on the case set up in the amended reply the plaintiffs are entitled to recover.

Judgment for the plaintiffs without costs.

Solicitors for plaintiffs: *Biggs, Roche, Sawyer & Co., for J. C. Buckwell & Co., Brighton.*

Solicitors for defendants: *Peacock & Goddard.*

(1) 1 De G. & J. 1.

W. H. G.

[IN THE COURT OF APPEAL.]

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Feb. 4, 5.

In the Matter of an Arbitration between ETHERINGTON and THE LANCASHIRE AND YORKSHIRE ACCIDENT INSURANCE COMPANY.

Insurance (Accident)—Death caused by Accident—Intervening Cause—Disease directly caused by Accident.

By the terms of a policy an accident insurance company undertook, if, at any time during the continuance of the said policy, the insured should sustain any bodily injury caused by violent, accidental, external, and visible means, then, in case such injury should, within three calendar months from the occurrence of the accident causing such injury, directly cause the death of the insured, to pay to the legal personal representatives of the insured the capital sum of 1000*l.* The policy contained the following proviso:—"Provided always and it is hereby as the essence of the contract agreed as follows: that this policy only insures against death where accident within the meaning of the policy is the direct or proximate cause thereof, but not where the direct or proximate cause thereof is disease or other intervening cause, even although the disease or other intervening cause may itself have been aggravated by such accident, or have been due to weakness or exhaustion consequent thereon, or the death accelerated thereby."

The assured, while hunting, had a heavy fall; and, the ground being very wet, he was wetted to the skin. The effect of the shock and the wetting was to lower the vitality of his system, and being obliged to ride home afterwards, while wet, still further lowered his vitality. The effect of this lowering of his vitality was to cause the subsequent development of pneumonia in his lungs, of which he died. The pneumonia was not septic or traumatic, but arose as a direct and natural consequence from the fact that the diminution of vitality caused through the accident, as above mentioned, allowed the germs called "pneumococci," which in small numbers are generally present in the respiratory passages, to multiply greatly and attack the lungs:—

Held, affirming the judgment of Channell J., that the death of the assured was directly caused by accident within the meaning of the policy, and that the case did not come within the proviso therein, and the company were consequently liable on the policy.

Appeal by the Lancashire and Yorkshire Accident Insurance Company from the judgment of Channell J. on an award in the form of a special case stated by arbitrators in an arbitration in respect of a claim made against the appellants by the administratrix of the estate of Ambrose Herbert Etherington, deceased, under a policy of insurance dated February 25, 1900.

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The deceased died of pneumonia consequent upon an accident as after mentioned.

By the policy the appellants undertook, if at any time during the continuance of the policy A. H. Etherington, the insured, should sustain "any bodily injury caused by violent, accidental, external, and visible means, then," (*a*) in case such injury should, "within three calendar months from the occurrence of the accident causing such injury, directly cause the death of the insured, ... to pay to the legal personal representatives of the insured" the capital sum of 1000*l*. Then followed other clauses relating to injuries through accidents not causing death. The policy further provided as follows: "Provided always and it is hereby as the essence of the contract agreed as follows: . . . . 3. That this policy only insures against death . . . . where accident within the meaning of the policy is the direct or proximate cause thereof, but not where the direct or proximate cause thereof is disease or other intervening cause, even although the disease or other intervening cause may itself have been aggravated by such accident, or have been due to weakness or exhaustion consequent thereon, or the death accelerated thereby."

On February 13, 1907, the insured went hunting, and, while endeavouring to jump his horse over a fence in which a strand of wire was concealed, was violently thrown to the ground upon the far side of the fence, which was a few feet lower than the side from which he took off. He fell upon his left shoulder and side. The ground was very wet, and he was wetted to the skin by the fall. As the result of the fall the insured suffered no "trauma" or wound to the body or lung, but he did suffer a severe shock to the nervous system, whereby the general vitality of his body was impaired. After the fall the insured remounted his horse and rode towards home. He was overtaken as soon as possible by his second horse, on which he then continued his journey home at a trot. The arbitrators found as a fact that to ride home in the way he did was, in the circumstances, the course least likely to aggravate the effects of the accident, and was rendered inevitable by it. The effect of the shock from which he suffered was to lower his general vitality, and the effect of the ride home in his then condition was to lower his vitality still further. The

cumulative effect of both these causes, but not the effect of either exclusively of the other, was to lower the general vitality of his body to an extent which made the onset of the "pneumo-coccus" possible, and the arbitrators found that that onset thereupon took place one hour and a half after the accident. The pneumo-coccus is the germ which causes the disease known as pneumonia. The course of this disease the arbitrators found upon the evidence to be as follows. The pneumo-coccus is generally present in the respiratory tracts of the normally healthy, but remains innocuous by reason of the resisting power of the body and of the lung in particular. If the vitality of the lung is lowered either directly and locally by physical injury to it, or indirectly by the general vitality of the body being lowered, the resisting power of the lung, together with that of the other organs, is impaired, and so continues until the vitality is restored. When the resisting power is impaired, the pneumo-coccus is enabled to settle upon the lung, and, while it remains impaired, to multiply there. The onset of the pneumo-coccus is contemporaneous with the lowered vitality, but pneumonia does not supervene until the germs have multiplied sufficiently. If the vitality remains impaired, these germs will so multiply, but, if the vitality recovers before they have done so, they will not multiply so as to cause the condition recognized as pneumonia. On February 14 the assured, against the opinion of his medical attendant, being still in great pain, took a journey occupying one hour and a half by train to London He there transacted his business until 6 P.M., when he developed the first physical sign of pneumonia. The arbitrators found as a fact that he was by 6 P.M. on February 14, twenty-nine and a half hours after the accident, suffering from fully developed pneumonia, from which he died on February 20. The journey to London and a day's work in the condition in which he then was tended to, and the arbitrators found as a fact that they did, impair still further his vitality and diminish his resistance to the pneumo-cocci, so increasing the severity of the attack.

The question for the opinion of the Court was whether the death of the insured was caused in such a manner as to entitle the claimant to payment of the sum insured by the policy.

Channell J. held, though not without doubt, that the findings

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of the arbitrators had brought the facts of the case within the terms of the policy, and that the death was caused by an accident within the meaning of the policy, and gave judgment for the claimant.

McCall, K.C., and *J. D. Crawford*, for the appellants. The general rule of law with regard to policies of insurance is that the proximate cause of the loss must alone be regarded: *Ionides* v. *Universal Marine Assurance Co.* (1) Here the proximate cause of the assured's death was pneumonia, not the accident. But, independently of this general rule, liability is excluded in this case by the terms of the policy, and particularly by clause 3 of the proviso therein. The death of the assured was clearly caused by disease "due to weakness or exhaustion consequent thereon," i.e, on the accident. The effect of the proviso is that, if the disease of which the assured died was directly due to weakness or exhaustion, then the company are not liable, although the weakness or exhaustion was due to the accident. The proviso appears to have been framed for the express purpose of avoiding the effect of the judgment in *Isitt* v. *Railway Passengers' Assurance Co.* (2)

[KENNEDY L.J. Would not the words of the proviso be fully satisfied by reading them as applicable to some disease independent of the accident, such as a fever, which invades the system of the assured through weakness consequent on the accident? The disease here would more correctly be described as a "supervening" cause than as an "intervening" cause.

VAUGHAN WILLIAMS L.J. The question is whether the term "intervening" is used with reference to time or to the chain of causation.]

It is submitted that the pneumonia which was the direct cause of death "intervened" between the accident and the death within the meaning of the proviso. In *Mardorf* v. *Accident Insurance Co.* (3) the septic pneumonia which caused the death of the assured was directly due to the septic germs introduced into his system at the time of the infliction of the wound, which was the

(1) (1863) 14 C. B. (N.S.) 259. (2) (1889) 22 Q. B. D. 504.
(3) [1903] 1 K. B. 584.

accident. In the present case there is no question of traumatic or septic pneumonia. Here the death was attributable to the assured going to his business in the City after pneumonia had developed. [They also cited *In re Scarr and General Accident Assurance Corporation.* (1)]

Clavell Salter, K.C., and *Lyttelton Chubb*, for the respondent. It is clear that, apart from the proviso, the case comes within the words of the policy which define the liability of the company. The death of the assured was the direct result of the accident. It was a result which might be expected in the ordinary and natural course of things from such an accident as the assured sustained. It is clear that the liability of the company is not confined to death immediately resulting from the accident, for the policy contemplates the death's occurring at any time within three months from the accident. If it does not occur till so long after the accident, in most cases it would in a sense be from disease produced by the accident. If the claimant can shew one continuous uninterrupted chain of causation leading from the accident to the death, the death may be said to have been directly caused by the accident. The words "disease or other intervening cause" in the proviso mean some disease or other cause which intervenes, i.e., is not consequent on the accident, which breaks the chain of causation. "Intervening" does not mean intervening in point of time, but intervening in the chain of causation. The only difficulty arises from the assured's having gone to his business in the City against the doctor's advice, which made him worse; but there is nothing equivalent to a finding that if he had stayed at home the result would have been different. It can hardly be said that this action on his part operated as a break in the chain of causation.

[The COURT intimated that counsel need not argue this point further.]

It is well settled that, if a policy is ambiguous and capable of two constructions, it must be construed most strongly against the company. [They cited *Fitton* v. *Accidental Death Assurance Co.* (2)]

J. D. Crawford, in reply.

(1) [1905] 1 K. B. 387. (2) (1864) 17 C. B. (N.S.) 122.

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VAUGHAN WILLIAMS L.J. I think the judgment of Channell J. was right and should be affirmed, though I do not say that the construction of the policy in this case is easy. I start with the consideration that it has been established by the authorities that in dealing with the construction of policies, whether they be life, or fire, or marine policies, an ambiguous clause must be construed against rather than in favour of the company. That principle was affirmed by this Court in *Joel* v. *Law Union and Crown Insurance Co.* (1), and particularly emphasized in his judgment in that case by Fletcher Moulton L.J., who says (2): "Hence I fully agree with the words used by Lord St. Leonards in his opinion in the case of *Anderson* v. *Fitzgerald* (3) to the effect that in this way provisions are introduced into policies of life assurance which, 'unless they are fully explained to the parties, will lead a vast number of persons to suppose that they have made a provision for their families by an insurance on their lives, and by payment of perhaps a very considerable proportion of their income, when in point of fact, from the very commencement, the policy was not worth the paper upon which it was written.'" I am of opinion, therefore, that in the case of policies of insurance the principle that the document must be construed "contra proferentes" strongly applies. That being so, I will proceed to the construction of the document, but, before doing so, I wish to say a word or two with reference to an observation made by the counsel for the company during the argument. It was said that we ought, in construing this policy, to bear in mind the case of *Isitt* v. *Railway Passengers' Assurance Co.* (4) There is no doubt that, if the principle of that decision is applicable in this case, it would be very difficult for the defendants to maintain their defence. In that case the contention in effect was that the accident was not the proximate cause of the death, and it was held that, the cold caught by the assured and its fatal effect being both natural consequences arising from the accident, and not foreign to and independent of it, his death came within the words "effects of injury caused by accident" in the policy. It was said that, the insurance companies not liking that decision,

(1) [1908] 2 K. B. 863.
(2) [1908] 2 K. B. 886.
(3) (1853) 4 H. L. C. 484, at p. 507.
(4) 22 Q. B. D. 504.

the proviso in the policy before us was framed for the very purpose of avoiding its effect in future. That may be historically true, but, if so, I think that, though that may have been the desire of the company, they have not had what I may call the commercial courage to express as plainly as they might have done what their counsel says they intended to express, namely, that the principle laid down in *Isitt* v. *Railway Passengers' Assurance Co.* (1) should not apply to their policies. There is another thing which I wish to say before proceeding to construe the policy. We have to construe this policy not merely in reference to this particular case; we must recollect that it is a document in the form which is used for the regular issue of policies by the company to persons who are desirous of insuring with them, and one must consider whither the construction contended for by the company would lead, if we were to adopt it. As far as I can see, if we adopted it, the result would be that it would be very difficult to establish the liability of the insurance company in any case except where the accident resulted in what may be called death on the spot. There is always in every other case a possibility of some supervening cause, and it would be very difficult for any one to look forward with any certainty to a sum being receivable on the policy if we were to put such a construction as was suggested upon a policy in this form. I think that some limitation of the terms of the proviso contained in the policy ought to be welcomed by the insurance companies themselves, for otherwise, in my opinion, the number of cases in which the policy could be enforced against the company would be so very much reduced that the practical result would soon be that very few persons would care to insure.

Having said so much, I will read the first words used by Channell J. in giving judgment: "Now the first question one has to consider is what is meant by the term 'intervening cause,' when used in connection with the well-known doctrine about the causa proxima, in order that you may say in law that the effect is caused by another thing, and not directly caused by the accident. I think that the expression 'new cause intervening' is practically the same as that used here, 'other intervening

(1) 22 Q. B. D. 504.

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cause,' and that it means some new and independent thing started, which together with the existing cause in some way or other—the one cause, possibly, in greater degree than the other cause, but the two acting together—ultimately causes a certain result; you must have something that may be called a new intervening cause, in order to prevent the existing cause which is operating to produce a well-known result from being said to be the real effective cause of what has happened." In my opinion the view so expressed by Channell J. is quite right. If that be so, then, upon the facts stated in the special case, I think the representative of the assured is entitled to judgment. The counsel for the company contended that, instead of saying that the new thing or new cause intended by the words "disease or other intervening cause" in the proviso must be something new and independent of the accident, we ought to read the words as meaning a new intervening cause, whether dependent on or independent of the accident. I do not agree. When the disease or other cause is dependent on the accident, I think it is right to say that the term "direct or proximate cause" covers in such a case not only the immediate result of the accident, but also all those things which may fairly be considered as results usually attendant upon the particular accident in question. In this case the assured fell from his horse. It was a heavy fall, and, though no breakage of bones, or wound, or obvious internal injury was caused, the fall involved a great shock to the system accompanied by a wetting. The assured had to ride home without a change of clothes, and the case makes it clear that the first result of such an accident would be a lowering to a great extent of the vitality of the person exposed to such a shock and wetting. It is also clear that such a lowering of vitality is in the ordinary course of things likely to produce a great development of the pernicious activity of those germs called pneumo-cocci, which are stated to exist even in healthy persons, and that this increased activity of the germs would, unless the vitality were restored again, ultimately produce pneumonia; and it was of pneumonia so produced that the assured died. Under these circumstances, I really do not think I need trouble myself with going at length into the cases to see how the

Courts have in particular cases dealt with the question whether the peril insured against, whether peril of the sea or accident or fire, or whatever it might be, was the proximate cause of the loss or injury so as to bring the case within the operation of the policy. In my opinion, it is impossible to limit that which may be regarded as the proximate cause to one part of the accident. The truth is that the accident itself is ordinarily followed by certain results according to its nature, and, if the final step in the consequences so produced is death, it seems to me that the whole previous train of events must be regarded as the proximate cause of the death which results. I have not looked at the cases to see how they deal with the question of insurance against fire; but I should be inclined to think that if there was a fire insurance, and, a fire taking place, and fire engines being used to put out the fire, the contents of the building insured were destroyed more or less by the fire and more or less by the water thrown on the fire to put it out, the whole result would be one which might be expected to arise from a fire, and the fire would be the proximate cause of the destruction of the goods, though there had been the intervening deluging of the goods by the water used to put out the fire. (1) I only, however, give that as an illustration, and do not base my judgment upon it.

Having made these observations, I now propose to read the material parts of the policy and to say a few words with regard to them. First I will read the words of the primary undertaking by the company. They undertake, if at any time during the continuance of the policy the insured shall sustain any bodily injury caused by violent, accidental, external, and visible means, then, "(*a*) in case such injury shall, within three calendar months from the occurrence of the accident causing such injury, directly cause the death of the insured, to pay to the legal personal representatives of the insured the capital sum of one thousand pounds." Now it cannot be disputed that the insured did in this case sustain such an injury as there described. Then I will deal with the proviso, and particularly that portion of it upon which the counsel for the company mainly relied. It

(1) See per Kelly C.B. in *Stanley* v. *Western Insurance Co.*, (1868) L. R. 3 Ex. 71, at p. 74.

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runs thus: "This policy only insures against death . . . . where accident within the meaning of the policy is the direct or proximate cause thereof, but not where the direct or proximate cause thereof is disease or other intervening cause." Pausing there for a moment, I should say that in that sentence "disease or other intervening cause" may well mean some disease or cause intervening, which is independent of the accident, and the ordinary results of the accident. Then the clause goes on, "even although the disease or other intervening cause may itself have been aggravated by such accident, or have been due to weakness or exhaustion consequent thereon, or the death accelerated thereby." I think that the same meaning must be put upon those words "disease or other intervening cause" in this part of the clause as in the former part of it. Notwithstanding that it might seem natural at first sight to construe the words "have been due to weakness or exhaustion consequent thereon" as covering a case where the disease has been caused solely by weakness or exhaustion resulting from the accident itself, I do not for the reasons which I have given think, having regard to the effect of the clause as a whole, they should be so construed.

FARWELL L.J. I am of the same opinion. I do not think that anybody, after hearing the arguments on both sides in this case, can have any doubt as to the ambiguity of this policy. I agree that the insurance company which prepares these documents is bound to make their meaning as clear as possible, and, if there is any ambiguity in the document, it does not lie in the mouth of the company, who may have been receiving premiums under it for years, to insist on that construction of an ambiguous clause which is in their favour. It is clear that, apart from the proviso, this case would come within the terms which primarily define the liability of the company under the policy. The words "within three calendar months from the occurrence of the accident" shew that the company's liability was not intended to be confined to sudden death, or death occurring immediately upon the accident. In cases where a man lingers for two or three months after the accident, I believe that it is never the

case that he dies from the accident pure and simple; but in all of such cases there would be some malady supervening upon the accident, such as heart failure, pneumonia, blood poisoning, hæmorrhage, or paralysis. In a case like this, where the first onset of the activity of the germs was within an hour and a half of the accident, and pneumonia was fully developed within twenty-nine and a half hours, I think that the case comes within the words which primarily define the liability. It is said that these words are qualified by the proviso, and that this case falls within it. Where there are clear words which prima facie import liability on the part of the company, and it is said that their effect is cut down by a subsequent proviso, I think we are bound to see that the terms of the proviso are clear and not repugnant: but, if the company's construction be adopted, the proviso in effect renders the three months period of none effect, and reduces the company's liability to cases of sudden death. I decline to put such a construction on an ambiguous proviso which it was the duty of the insurance company to make absolutely clear, if they intended it to have such an effect as that for which they contend.

KENNEDY L.J. I share the hesitation of Channell J. with regard to the application of the policy before us to the facts of this case, but on the whole I come to the same conclusion as my brothers Vaughan Williams and Farwell. It is, no doubt, true with regard to actions on policies which are in the nature of indemnity policies, such as marine and fire policies—that is to say, policies in which the undertaking is, upon the happening of a certain event, to make good, to the extent of the insurance, any loss thereby caused—that, in the absence of anything to the contrary in the policy, whether the event may have been brought about by negligence of the assured or his servants or other causes or not, the proximate cause of the loss can alone be regarded. It is different in the case of a bill of lading, for there, as Willes J. pointed out in *Grill* v. *General Iron Screw Collier Co.* (1), the nature of the contract admits of other matters being taken into consideration, such as the negligence of the shipowner

(1) (1866) L. R. 1 C. P. 600, at p. 611; (1868) L. R. 3 C. P. 476.

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or his crew, and you are not confined to the causa proxima, but may see whether the causa causans is not something which involves liability on the part of the shipowner, though other causes may also have combined with it to produce the loss. If the shipowner, or any one for whom he is responsible, has brought about the loss by breach of contract, he cannot say by way of defence that the causa proxima of the loss was something which was excepted by the bill of lading. In the case of accident policies I should say that, generally speaking, the causa proxima is what must be regarded. In *Fenton* v. *Thorley & Co., Ld.* (1), Lord Lindley, however, pointed out that, in dealing with the meaning of the term "accident" in an Act of Parliament, the Workmen's Compensation Act, 1897, the rule applicable in the case of contracts of insurance that the proximate cause of loss can alone be regarded could not be rigidly applied, and that the word "accident" was not a technical legal term with a clearly defined meaning, and was often used to denote both the cause and the effect. But in point of fact, though the counsel for the company may have been right in his general statement of the rule of law on the subject, I do not think that we really have to deal with that rule here, because the question in this case appears to me to turn upon the particular words of the policy. I cannot compliment the draftsman of this policy on its wording. I do not think that, if it was intended to rely on the use of the word "proximate," which has acquired a technical meaning, it was wise to add the word "direct"; because, if it was intended to mean the same thing as "proximate," it was superfluous, and if it was intended to mean something different from "proximate," it is a difficult question what it does exactly mean. But the real difficulty here seems to me to arise on a portion of clause 3, of the proviso, which qualifies the liability imported by what has gone before by saying that the policy is not to insure against death "where the direct or proximate cause thereof is disease or other intervening cause, even although the disease or other intervening cause may itself have been aggravated by such accident, or have been due to weakness or exhaustion consequent thereon, or the death accelerated thereby." To my mind, on the

(1) [1903] A. C. 443.

whole, the view adopted by Channell J. was correct when he said that the words "intervening cause" in that clause meant some new cause independent of the accident. As has been pointed out, if the words of the document, which has been prepared by the company, may reasonably be said to be ambiguous, it ought in such a case as this to be construed most strongly against the company who are its framers. I think that in this case the words "disease or other intervening cause" may reasonably be looked on as ambiguous. The gist, as it seems to me, of the view put forward by the defendants is that the word "intervening," as used in this document, means "supervening," or following. The argument on the other side is that it does not mean that, but is used in the sense in which Channell J. read it, as equivalent to something independent of and unconnected with the accident as it happened at the time; something which introduces a new link of an extraneous character into the chain of causation beginning with the accident and ending in the death. To put it in the way in which the matter presents itself to me, I should say that the words mean something which cannot, to use a term as I understand it to be employed by doctors, and recently by the Legislature in the Workmen's Compensation Act, 1906 (1), be described as a "sequela" of the accident. It seems to me, upon the whole, that they are not intended to exclude liability in the case of death where it cannot be said that something new and unconnected with the accident, or which is not a natural sequela of the accident, has intervened. Here, as my brother Farwell has pointed out, within a few hours of the accident a condition in the region of the lung was set up which no one can say was not a result of the accident, and which was really the birth of pneumonia. It is not a case of a new disease or other cause which intervenes. The fatal pneumonia was a "sequela" of the accident against the consequences of which it was the object of the policy to insure. Again, I think that the words "even although the disease or other intervening cause may . . . . have been due to weakness or exhaustion consequent thereon" in the last limb of the clause are capable of being satisfied by reading them in the same way. I do not think that the company can bring themselves

(1) See the Third Schedule to the Act.

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within those words merely by shewing that the disease from which the assured died was due to weakness consequent on the accident. They must shew that it was a new and independent cause which intervened. It appears to me that the words were intended to cover cases, of which Channell J. gave examples, where a man is weakened by an accident, and then a disease wholly unconnected with the accident attacks him by reason of his weakness, or is aggravated by that weakness. For these reasons I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellants: *Pritchard, Englefield & Co.*
Solicitors for respondent: *Whitehouse, Etherington & Co.*

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Feb. 10, 11.

[IN THE COURT OF APPEAL.]

SPILLERS & BAKERS, LIMITED *v.* GREAT WESTERN RAILWAY COMPANY.

Railway—Carriage of Goods—Reduction of "Rate authorized" where Company does not provide Trucks—Meaning of "Rate authorized"—Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, (54 & 55 *Vict. c. ccxxii.*), *sched.*, *s.* 2 (*b*).

By the schedule to the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, s. 2 (*b*), it is provided that, in certain cases, where the company do not provide the trucks in which merchandise is carried on the railway, the "rate authorized for conveyance" shall be reduced by a sum which shall, in the event of difference between the company and "the person liable to pay the charge," be determined by an arbitrator:—

Held, that the "rate authorized for conveyance" in the above-mentioned enactment means the actual rate in force for the time being as published in the company's book of rates, and not the maximum rate which the company are by the schedule authorized to charge.

APPEAL by the Great Western Railway Company from a decision of the Railway and Canal Commissioners (A. T. Lawrence J., the Hon. A. E. Gathorne-Hardy, and Sir James Woodhouse), sitting as arbitrators upon a difference between the company

and Spillers & Bakers, Limited, under s. 2 (*b*) of the schedule to the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891.

The company were in the habit of carrying grain, flour, meal, and offals for Spillers & Bakers, Limited, from their mills at Cardiff to places on the company's system for distances not exceeding fifty miles. The rates in respect of such carriage published in the book of rates kept by the company under the Regulation of Railways Act, 1873, s. 14, and charged by the company, were lower than the maximum rates authorized to be charged for carriage of such articles by the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891 (1). The traffic was carried in trucks belonging to Spillers & Bakers, Limited. A difference having arisen between the railway company and Spillers & Bakers, Limited, as to the reduction to be made under s. 2 (*b*) of the schedule to the last-mentioned Act in respect of the fact that the company did not provide trucks, the Board of Trade, on the application of Spillers & Bakers, Limited, appointed the Railway Commissioners to act as arbitrator under the Board of Trade Arbitrations Act, 1874.

Spillers & Bakers, Limited, claimed that the Commissioners should determine under the above-mentioned sub-section by what sum the rates actually in force for the time being in respect of

(1) By s. 2 of the schedule to the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, it is provided that "the maximum rate for conveyance is the maximum rate which the company may charge for the conveyance of merchandise by merchandise train, and, subject to the exceptions and provisions specified in this schedule, includes the provision of locomotive power and trucks by the company and every other expense incidental to such conveyance not hereinafter provided for. Provided that . . . . (*b*) where, for the conveyance of merchandise other than merchandise specified in class A of the classification, the company do not provide trucks, the rate authorized for conveyance shall be reduced by a sum which, for distances not exceeding fifty miles, shall, in case of difference between the company and the person liable to pay the charge, be determined by an arbitrator to be appointed by the Board of Trade, and for distances exceeding fifty miles shall be the charge authorized to be made by the company for the provision of trucks when not included in the maximum rate for conveyance."

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the traffic in question, as shewn by the company's book of rates, should be reduced by reason of the company's not providing trucks. The contention of the railway company was that the function of the arbitrator under the sub-section was merely to determine what reduction was to be made in the maximum rates authorized by the schedule to the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891.

The Railway Commissioners decided in favour of the contention of Spillers & Bakers, Limited, following the decision in *Cowdenbeath Coal Co.* v. *North British Ry. Co. and Caledonian Ry. Co.* (1).

Sir Alfred Cripps, K.C., and *Montague Lush, K.C.* (*Harold Russell* with them), for the appellants, the railway company. The words "rate authorized" in the schedule to the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, s. 2 (*b*), must mean the maximum rate authorized by the schedule to be charged. The only dispute with which the arbitrator is authorized to deal under the sub-section clearly is a dispute as to the reduction to be made in the maximum rate where the railway company do not provide trucks. It was well known when the Act was passed that railway companies frequently did not charge the full maximum rate which they were authorized to charge, and if the Legislature meant by "rate authorized" the "actual rate charged," why did they not say so in plain terms? The general scheme of the legislation on the subject of railway rates is to fix a maximum rate, and to leave it open to the company to fix the actual rate within the maximum. It is consistent with that scheme to hold that s. 2 (*b*) provides for a reduction of the maximum where the company do not find the trucks, leaving it open to the company to fix the actual rate within that reduced maximum. The contention for the respondents, on the other hand, involves that the arbitrator must fix the actual sum to be charged. Upon the whole face of the schedule it is apparent that the Legislature has used "maximum rate" and "authorized rate" as convertible terms. [They cited *Cowdenbeath Coal Co.* v. *North*

(1) (1894) 8 Ry. & Ca. Tr. Cas. 251.

British Ry. Co. and Caledonian Ry. Co. (1); *Midland Ry. Co.* v. *Myers, Rose & Co.* (2); *Salt Union, Ld.* v. *North Staffordshire Ry. Co.* (No. 2) (3); *Pickford* v. *Grand Junction Ry. Co.* (4); *Canada Southern Ry. Co.* v. *International Bridge Co.* (5)]

Balfour Browne, K.C., and *R. Whitehead*, for the respondents, Spillers & Bakers, Limited. The arbitration provided for in s. 2 (*b*) is one between a railway company and an individual trader on a question depending upon the particular circumstances applicable to that individual. Maximum rates are applicable in the case of all traders. The reduction proper to be made because the trader provides his own trucks must depend on a variety of special circumstances varying in each case, such as the character of trucks required for the particular traffic. It is impossible to suppose that the legislature intended that the maximum rates should be reduced as the result of an arbitration between a particular individual and the company. There are many cases in which the actual sum to be charged by the railway company is fixed in pursuance of legislation, as, for instance, in the case of a through rate. "Rate authorized for conveyance" in the subsection must be the equivalent for "the charge" which the person is spoken of as "liable to pay" further on in the subsection. Having regard to the provisions of the Railways Regulation Act, 1873, s. 14, the Railway and Canal Traffic Act, 1888, s. 33, and the Railway and Canal Traffic Act, 1894, s. 1, it is clear that a railway company cannot always be said to be authorized to charge the maximum rate, for, if the rate published in their book of rates in pursuance of the Railways Regulation Act, 1873, is below the maximum, they cannot charge the maximum so long as that rate is in force.

Cripps, K.C., in reply.

VAUGHAN WILLIAMS L.J. In my judgment this appeal fails, and the contention for the respondents must prevail. I confess that I was for a long time persuaded that the argument for the

(1) 8 Ry. & Ca. Tr. Cas. 251.
(2) [1908] 2 K. B. 356 (1909) A. C. 13.
(3) (1898) 10 Ry. & Ca. Tr. Cas. 224.
(4) (1842) 10 M. & W. 399.
(5) (1883) 8 App. Cas. 723.

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railway company was correct, but I was not then aware of matters which have to be taken into consideration by reason of the provisions of the Acts of 1873, 1888, and 1894 to which we have been referred by the counsel for the respondents. I thought that prima facie, and if there was nothing to the contrary, it was impossible to read the words "rate authorized" in s. 2 (*b*) of the schedule to the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, as meaning anything but the maximum rate authorized by the schedule; but we have had our attention directed to matters which in this particular case go to shew that the meaning which I should prima facie have been disposed to give to the words "rate authorized" is not the right one. Sect. 2 of the schedule is, so far as material, as follows: "The maximum rate for conveyance is the maximum rate which the company may charge for the conveyance of merchandise by merchandise train, and, subject to the exceptions and provisions specified in this schedule, includes the provision of locomotive power and trucks by the company and every other expense incidental to such conveyance not hereinafter provided for. Provided that . . . . (*b*) where for the conveyance of merchandise other than merchandise specified in class A of the classification the company do not provide trucks, the rate authorized for conveyance shall be reduced by a sum which for distances not exceeding fifty miles shall, in case of difference between the company and the person liable to pay the charge, be determined by an arbitrator to be appointed by the Board of Trade, and for distances exceeding fifty miles shall be the charge authorized to be made by the company for the provision of trucks when not included in the maximum rate for conveyance."

Now, with regard to sub-s. (*b*), I wish to make the preliminary observation that we must not forget that this is a clause which provides for the settlement of a dispute between a railway company and a particular trader, and prima facie it is not probable that the Legislature intended that the maximum rates should be affected by the result of an arbitration on a dispute between the railway company and an individual trader. Beyond this, when one reads the words "rate authorized" in connection

with the subsequent words "person liable to pay the charge," it seems to me plain that "rate authorized" must mean the rate which the person liable to pay the charge has to pay. If there had been nothing to consider but the Act of 1891, I should have said that "rate authorized" meant the maximum rate. I think, however, that for the purpose of construing s. 2 (*b*) of the schedule to the Act of 1891 we must take into consideration the other enactments which have been brought to our notice. The first of these is s. 14 of the Regulation of Railways Act, 1873, which is as follows: "Every railway company and canal company shall keep at each of their stations and wharves a book or books showing every rate for the time being charged for the carriage of traffic, other than passengers and their luggage, from that station or wharf to any place to which they book, including any rates charged under any special contract, and stating the distance from that station or wharf of every station, wharf, siding, or place to which any such rate is charged. Every such book shall during all reasonable hours be open to the inspection of any person without the payment of any fee. The Commissioners may from time to time, on the application of any person interested, make orders with respect to any particular description of traffic, requiring a railway company or canal company to distinguish in such book how much of each rate is for the conveyance of the traffic on the railway or canal, including therein tolls for the use of the railway or canal, for the use of carriages or vessels, or for locomotive power, and how much is for other expenses, specifying the nature and detail of such other expenses." Then there is a provision for a penalty for non-compliance with the requirements of the section. Next it is provided by s. 33, sub-s. 6, of the Railway and Canal Traffic Act, 1888, as follows: "Where a railway company intend to make any increase in the tolls, rates, or charges published in the books required to be kept by the company for public inspection under s. 14 of the Regulation of Railways Act, 1873, or this Act, they shall give, by publication in such manner as the Board of Trade may prescribe, at least fourteen days' notice of such intended increase, stating in such notice the date on which the altered

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rate or charge is to take effect; and no such increase in the published tolls, rates, or charges of the railway company shall have effect unless and until the fourteen days' notice required under this section has been given." There does not appear to have been any opportunity given by that Act of objecting to the increase in the rates. But by the Railway and Canal Traffic Act, 1894, s. 1, sub-s. 1, it is now provided that "Where a railway company have, either alone or jointly with any other railway company or companies, since the last day of December, one thousand eight hundred and ninety-two, directly or indirectly increased, or hereafter increase directly or indirectly, any rate or charge, then, if any complaint is made that the rate or charge is unreasonable, it shall lie on the company to prove that the increase of the rate or charge is reasonable, and for that purpose it shall not be sufficient to show that the rate or charge is within any limit fixed by an Act of Parliament or by any provisional order confirmed by Act of Parliament." Having referred to those Acts, I desire to point out that it is not disputed that, wherever there is in a book kept by the company in compliance with the Act of 1873 a rate which is lower than the maximum rate mentioned in the Act of 1891, it would no longer, in respect of the particular class of traffic in question, be open to the company to charge the maximum rate mentioned in that Act. The provision for keeping the book of rates prescribed by s. 14 of the Regulation of Railways Act, 1873, clearly has the effect of making the rate mentioned in the book, so long as it remains in force, the maximum rate which the company can charge. That Act was in force when the Act of 1891 was passed. When one looks at that enactment it appears at once to answer the question which was asked, I think, by my brother Kennedy during the argument, namely, why in sub-s. (*b*) the Legislature did not use the words "maximum rate authorized by this Act." The reason is that there was an Act then in force which made it impossible to use those words. It is impossible to leave out of consideration, in construing s. 2 (*b*) of the Schedule to the Act of 1891, the Acts of 1873 and 1888. I come to the conclusion that "rate authorized" in that sub-section means, or at any rate includes, the rate which can

be charged at the time when the particular traffic is carried. It was admitted that the rate which could be charged for the particular kind of traffic forwarded by the respondents was lower than the maximum rate authorized by the Act of 1891. Under those circumstances I have no doubt that the deduction contemplated by the Act of 1891 is to be made from the rate in force, which is the rate that appears in the book kept by the company pursuant to the Act of 1873, as supplemented by the Act of 1888.

FARWELL L.J. I am of the same opinion. The argument of the counsel for the respondents has convinced me that the proper mode of construing s. 2 (*b*) of the Schedule to the Act of 1891 is to read the words "rate authorized" in connection with the subsequent words "person liable to pay the charge." The dispute under that sub-section is one which arises between the company on the one side and an individual trader on the other as to what rate the company is to be authorized to charge the latter. During the argument of the counsel for the company I thought that the only rate which could be called "the rate authorized" was the maximum rate under the Act, and that it would not be right to say that the expression "the rate authorized" was applicable to the rate actually charged because that rate was lower than the maximum rate authorized; but it is clear that the term "rate authorized" in the sub-section is not equivalent to "maximum rate"; for we find on looking at the statutes of 1873 and 1888 that the company is only authorized to charge the rate published in the rate-book which they have to keep under those Acts, and therefore, where that rate is lower than the maximum rate, they are not authorized to charge the latter. The Railway and Canal Traffic Act, 1888, s. 33, sub-s. 6, expressly provides that "no increase in the published tolls, rates, or charges of the railway company shall have effect unless and until the fourteen days' notice required under this section has been given." Subsequently to the Act of 1891 the legislation with regard to increase in the rates published in the rate-book was carried still further by the Act of 1894, but, apart from that Act, and at the date when the Act of 1891 was

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passed, the only rate which the company were authorized to charge was that published in the rate-book kept by them under the Act of 1873. For these reasons I think that the appeal should be dismissed.

KENNEDY L.J. The question raised by this case may be put in a very few words. It is whether the words "rate authorized" in s. 2 (*b*) of the Schedule to the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, mean the maximum rate which is authorized to be charged by that Act, or the rate in force for the time being. It seems to me that on the whole the latter is the correct interpretation of the words. With regard to the reasons for that conclusion I do not think I could usefully add anything to the judgments of the other members of the Court.

Appeal dismissed.

Solicitor for appellants: *R. R. Nelson.*

Solicitors for respondents: *Downing, Handcock & Co., for Downing and Handcock, Cardiff.*

E. L.

STRONG, APPELLANT *v.* TREISE, RESPONDENT. 1909 *Jan* 12.

Education—Child employed in Agriculture—Exemption from School Attendance—Child between Thirteen and Fourteen Years of Age—By-law of Local Education Authority—Elementary Education (School Attendance) Act (1893) Amendment Act, 1899 (62 & 63 Vict. c. 13), s. 1—Elementary Education Act, 1900 (63 & 64 Vict. c. 53), s. 6, sub-s. 1.

The power of the local education authority, under the proviso in s. 1 of the Elementary Education (School Attendance) Act (1893) Amendment Act, 1899, to make a by-law for any parish within their district providing for the total exemption from school attendance of a child between thirteen and fourteen years of age who is to be employed in agriculture, though the child has not received a certificate of educational proficiency, is not affected by s. 6 of the Elementary Education Act, 1900.

CASE stated by justices for the county of Cornwall.

An information was preferred by the appellant, who was the clerk to the Liskeard and Fowey District Education Committee, under the by-laws of the Education Committee of the County Council of Cornwall, made on March 14, 1904, and confirmed on June 20, 1904, against the respondent, for that he (the respondent) on April 10, 1908, did unlawfully take into his employment one Nellie Budge, a child between the age of five years and fourteen years, in contravention of the Elementary Education Act, 1876 (39 & 40 Vict. c. 79) (1), in that the child, being of the age of ten years or upwards, had not then obtained a certificate either of her proficiency in reading, writing, and elementary arithmetic, or of her previous due attendance at a certified efficient school as in the Act mentioned, and was not, being of the age of ten years or upwards, employed and attending school in compliance with the provisions of the Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16), or of any by-laws of the local authority made according to law, contrary to the Education Acts, 1870 to 1902.

Upon the hearing of the information the following facts were admitted or proved :—The child, Nellie Budge, was of the age of thirteen years and seven months. She was in the full-time

(1) See note, p. 623, post.

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employment of the respondent, who was a farmer, and she assisted him in the dairy work of the farm. She was not totally exempt from attending school under by-law 5 (*a*) (1) of the local authority, namely, the Cornwall County Council Education Committee. She was not partially employed and

(1) By-laws made under s. 74 of the Education Act, 1870 (33 & 34 Vict. c. 75), as amended by the Education Acts, 1876 to 1902, for the administrative county of Cornwall, by the Education Committee of the County Council of Cornwall:—

By-law 2: "The parent of every child of not less than 5 nor more than 14 years of age shall cause such child to attend school unless there be a reasonable excuse for non-attendance . . . ."

By-law 5: "(*a*) A child between 12 and 14 years of age shall not be required to attend school if such child has received a certificate from one of His Majesty's Inspectors of Schools that it has reached the sixth standard prescribed by the code for the time being.

"(*b*) When a child between 12 and 14 years of age, being beneficially employed to the satisfaction of the local authority, has either (i.) received a certificate from one of His Majesty's Inspectors of Schools that it has reached the fifth standard prescribed by the code for the time being; or (ii.) obtained a certificate that it has made 300 attendances in not more than two schools in each year for five preceding years, whether consecutive or not; such child may, (x) while regularly making five attendances in each week in which the school is open, be exempt from further attendance at school, or may (y) after having completed 250 attendances during one of the periods of nine months in the schedule hereto be exempt from further attendances until the beginning of the corresponding period next ensuing.

"(*c*.) The parent of any child may, at any time after such child is 11 years of age, and has passed the fifth standard, give notice to the local authority that such child is to be employed in agriculture.

"The minimum age for exemption from school attendance under by-law 5 (*a*) shall be 13 in the case of such child.

"Such child while between the ages of 11 and 13 shall attend school 250 times in the year, namely, from September 1 to May 31 following, or from October 1 to June 30 following.

"Any such child, so soon as it shall have made the number of attendances required for one of the periods of nine months in the schedule hereto, shall, whilst employed in agriculture, be exempt from further obligation to attend school until the beginning of the corresponding period next ensuing.

"A certificate from the head teacher of a school that such child has made the attendances required by this by-law, together with the production of the labour certificate, shall be sufficient evidence to justify the employment in agriculture of such child."

The schedule provided that the period of nine months should, in the case of children residing in certain parishes, be from September 1 to May 31, and in the case of all other children should be from October 1 to June 30.

attending school in accordance with any of the provisions of the Factory Acts or of any of the by-laws of the local authority. No such notice as that mentioned in the first paragraph of by-law 5 (*c*) had been given, and no certificate of attendance or labour certificate was produced as provided in the last paragraph of by-law 5 (*c*).

The appellant contended that the child, not having complied with the conditions of by-law 5 (*a*), was not totally exempt from attendance; that the effect of by-law 5 (*c*) was to enable the child to be employed in agriculture at the age of eleven instead of twelve; that in return such child forfeited the right to claim total exemption under by-law 5 (*a*) until it reached the age of thirteen; that on reaching the age of thirteen such child was not free to leave school as a matter of course, but came within the provisions of by-law 5 (*a*), (*b*), and (*c*), and could therefore only obtain total exemption from attending school on attaining the age of fourteen years or previously thereto receiving a certificate of having reached the sixth standard as provided in by-law 5 (*a*) of the by-laws.

It was contended on behalf of the respondent that the child, being employed in agriculture, was totally exempt from attending school by virtue of the provisions of the Elementary Education (School Attendance) Act (1893) Amendment Act, 1899 (62 & 63 Vict. c. 13), and by-law 5 (*c*) of the local authority made thereunder; that the effect of s. 1, proviso 2, of the above-mentioned Act of 1899 was merely to enable the local authority, in the case of children employed in agriculture, to substitute the age of thirteen for that of fourteen mentioned in by-law 5 (*a*), and having by the by-laws fixed the age of thirteen, their powers were exhausted, and consequently that at the age of thirteen a child so employed was totally exempt from school attendance whether it had obtained the certificate mentioned in by-law 5 (*a*) or not; and that any provision of by-law 5 (*c*) to the contrary was unauthorized and irregular, and contrary to s. 74, sub-s. 2, of the Elementary Education Act, 1870 (33 & 34 Vict. c. 75).

The justices were of opinion that the child, being wholly and beneficially employed in agriculture and being above the age of thirteen years, was totally exempt from school attendance by

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virtue of the above-mentioned statute and such part of by-law 5 (*c*) as was in accordance therewith, and held that the respondent did not illegally employ the child, and they therefore dismissed the information, it being, in their opinion, clearly the intention of the Act that in the public interest children in rural districts should be encouraged to engage in agriculture at an earlier age than was deemed desirable in the case of any other industry, and that agriculture was expressly named as the sole industry for which exemption of children from school attendance could be legally claimed at the age of thirteen years.

The question for the opinion of the Court was whether the justices came to a correct decision in point of law. (1)

W. T. Lawrance, for the appellant. The question whether this child was illegally employed by the respondent depends upon whether she was entitled unconditionally to leave school. She had not obtained a certificate that she had reached the sixth standard, and therefore, being under fourteen years of age, could not claim total exemption from school attendance. By s. 74, sub-s. 1, of the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), school boards are empowered to make by-laws, with the approval of the Education Department, requiring the parents of children of such age, not less than five nor more than thirteen, as may be fixed by the by-laws, to cause such children (unless there is some reasonable excuse) to attend school. By the proviso in the section any such by-law shall provide for the total or partial exemption of such child from the obligation to attend school if an inspector of schools certifies that the child has reached a standard of education specified in the by-law. Sect. 5 of the Elementary Education Act, 1876 (39 & 40 Vict. c. 79), prohibits a person from taking into his employment a child of the age of ten years or upwards—that is, by s. 48, a child between the ages of five and fourteen years—unless the child has attained a certificate of proficiency in education or previous school

(1) The case was argued on a former occasion on behalf of the appellant, but the respondent did not appear. The Court ordered the case to stand over so that the respondent might be represented by counsel on the argument, and the justices now instructed counsel to argue the case on behalf of the respondent.

attendance. The Elementary Education Act, 1880 (43 & 44 Vict. c. 23), s. 2, imposes on the local authority the obligation to make by-laws under s. 74 of the Act of 1870 respecting the attendance of children at school, and s. 4 provides that every person who takes into his employment a child between ten and thirteen years of age before the child has reached the standard fixed either for total or partial exemption shall be deemed to take the child into his employment in contravention of the Act of 1876. The Elementary Education (School Attendance) Act, 1893 (56 & 57 Vict. c. 51), s. 1, substituted the age of eleven for that of ten in s. 74 of the Elementary Education Act, 1870; and the Elementary Education (School Attendance) Act (1893) Amendment Act, 1899 (62 & 63 Vict. c. 13), s. 1, further substituted the age of twelve for that of eleven in the Act of 1893. The result of the legislation so far is that the local authority are bound to make by-laws requiring children between the ages of five and thirteen to attend school, and such by-laws must provide for the total or partial exemption from school attendance of children between the ages of twelve and thirteen. The second proviso in s. 1 of the Act of 1899 contains an important provision in favour of children who are going to be employed in agriculture. It empowers the local authority to make a by-law for any parish, fixing thirteen years as the minimum age for exemption from school attendance in the case of children to be employed in agriculture, and in such parish such children over eleven and under thirteen years of age who have passed the standard fixed by the by-laws for partial exemption from school attendance shall not be required to attend school more than 250 times in any year, and the by-law is to have effect as a by-law made under s. 74 of the Elementary Education Act, 1870. Under that Act, therefore, the local authority might make a by-law giving partial exemption to a child between eleven and thirteen years of age who was to be employed in agriculture and who had reached a certain standard, but the minimum age for total exemption was thirteen. In the case of other children the age for partial or total exemption according to the standard reached was from twelve to thirteen. The Legislature probably thought that, as a child to be employed in agriculture might claim partial

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exemption from school attendance a year earlier than other children, it should not be able to claim total exemption until it was thirteen years of age, instead of at twelve as in the case of other children. In the following year the Elementary Education Act, 1900 (63 & 64 Vict. c. 53), s. 6, sub-s. 1, substituted fourteen for thirteen years in s. 74 of the Elementary Education Act, 1870, and s. 4 of the Elementary Education Act, 1880. The effect of that enactment is to make fourteen years the minimum age for total exemption from school attendance in the case of all children unless they have attained a certain standard. The result of all the above legislation is that a child cannot unconditionally leave school until it is fourteen years of age. Between twelve and fourteen a child can, under appropriate by-laws, claim total or partial exemption if a certain standard has been reached. A child, however, who is to be employed in agriculture is placed in a special category, and it can claim partial exemption on similar grounds if between the age of eleven and fourteen years; but it can only claim total exemption on reaching the sixth standard if it has attained the age of thirteen years. The child in the present case was between thirteen and fourteen years of age, and as she had not attained a standard entitling her to exemption from school attendance, the respondent committed an offence under s. 5 of the Elementary Education Act, 1876, by taking her into his employment. The decision of the justices was therefore wrong.

J. A. Hawke, for the respondent. A child who is to be employed in agriculture is entitled under by-laws to that effect made under s. 1 of the Elementary Education (School Attendance) Act (1893) Amendment Act, 1899, to leave school unconditionally on attaining the age of thirteen years. The Legislature thought that a child who is going to be employed in agriculture does not require the same degree of education as a child who is going into another employment. The view of the justices was that, as the by-law had fixed thirteen as the age for total exemption from school attendance of a child to be employed in agriculture, the powers of the local education authority were exhausted, and the conditions attached thereto were of no validity; otherwise a child who was to be employed in agriculture would be worse,

not better, off than an ordinary child. Under the Education Acts before 1899, subject to the provisions of s. 4 of the Elementary Education Act, 1880, no one could employ a child under fourteen years of age unless it had reached a certain standard: see s. 5 and the definition of "child" in s. 48 of the Elementary Education Act, 1876. At that time a child could leave school at the age of thirteen years: s. 74 of the Elementary Education Act, 1870. By s. 6 of the Elementary Education Act, 1900, fourteen years was substituted for thirteen in s. 74 of the Act of 1870 and in s. 4 of the Elementary Education Act, 1880. The effect of that it is to impose an obligation on local authorities to make by-laws requiring the attendance of children generally at school until they attain the age of fourteen years, subject to their claiming total or partial exemption upon reaching a certain standard, but it does not affect the special provision in the Act of 1899 in favour of children to be employed in agriculture. That Act is not mentioned in the Act of 1900, which is entitled "An Act to amend the Elementary Education Acts, 1870 to 1893." The Act of 1899, therefore, remains unaffected, and the justices' decision is right.

W. T. Lawrance, in reply.

LORD ALVERSTONE C.J. It is satisfactory that the case has now been fully argued on both sides; the point which has been relied upon on behalf of the respondent occurred to us when the appeal was opened on the former occasion, but we thought it better to hear a full argument upon it before giving our judgment.

In this case the summons is for employing a child between the age of thirteen and fourteen; it is not a summons against the parent for not sending the child to school; whether different considerations apply in the two cases I do not stop to inquire. By s. 4 of the Elementary Education Act, 1876, it is declared to be the duty of the parent of every child to cause such child to receive efficient elementary education, and a child is defined by s. 48 to mean a child between the ages of five and fourteen years. Sect. 5 provides that a person shall not take into his

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employment a child under the age of ten years, or a child of that age or upwards who has not obtained a certificate of educational proficiency or of previous attendance at school, unless such last-mentioned child is employed and is attending school in accordance with the provisions of the Factory Acts or of a by-law of the local authority made under s. 74 of the Elementary Education Act, 1870, as amended by subsequent legislation; and s. 6 renders any person who takes a child into his employment in contravention of the Act liable to a penalty. Sect. 74 of the Act of 1870 enables a school board, with the approval of the Education Department, to make by-laws requiring the attendance at school of children between the ages of five and thirteen years. This object was further advanced by s. 4 of the Elementary Education Act, 1880, which provides that any person who takes into his employment a child of the age of ten and under the age of thirteen years resident in a school district, before that child has obtained a certificate of having reached the standard of education fixed by a by-law in force in the district for the total or partial exemption of children of the like age from the obligation to attend school, shall be deemed to take such child into his employment in contravention of the Elementary Education Act, 1876, and shall be liable to a penalty accordingly. So far we find that the combined effect of ss. 4, 5, 6, and 48 of the Act of 1876 and s. 4 of the Act of 1880 is to subject persons who take into their employment children in certain cases under the age of thirteen, and in other cases under the age of fourteen, to a penalty.

I pass to the Elementary Education (School Attendance) Act (1893) Amendment Act, 1899. It cannot be disputed that one of the objects for which this Act was passed was to allow children to be employed in agriculture at an earlier age than in other employments. Indeed counsel for the appellant admitted that that was so. Sect. 1 of that Act raised the minimum age at which a child can obtain total or partial exemption from school attendance from eleven to twelve, and in the second proviso in the section it is enacted that "the local authority for any district may, by by-law for any parish within their district, fix thirteen years as the minimum age for exemption from school

attendance in the case of children to be employed in agriculture, and that in such parish such children over eleven and under thirteen years of age, who have passed the standard fixed for partial exemption from school attendance by the by-laws of the local authority, shall not be required to attend school more than 250 times in any year. Such by-law shall have effect as a by-law made under s. 74 of the Elementary Education Act, 1870, and all Acts amending the same." It is clear that the words "exemption from school attendance," where they first occur in the proviso, mean total exemption, because partial exemption from school attendance is dealt with later on in the proviso. When one remembers the general prohibition in the Elementary Education Act, 1876, against the employment of children under fourteen years of age, this is not an unnatural way of saying that the minimum age for employing children in agriculture shall be thirteen. Therefore it seems to me that under the Act of 1899 the Legislature gave power to the local authority to authorize, by means of a by-law, partial exemption from school attendance in the case of children between the ages of eleven and thirteen who have passed the requisite standard and who are to be employed in agriculture, and total exemption from school attendance of children of the age of thirteen years who are to be employed in agriculture. Accordingly, if the local authority have made a by-law to that effect, total exemption from school attendance can, unless that Act has been interfered with by later legislation, be claimed in the case of a child who has reached the age of thirteen years and who is to be employed in agriculture.

In the following year the Elementary Education Act, 1900, was passed, which by s. 6, sub-s. 1, enacts that "in s. 74 of the Elementary Education Act, 1870, and in s. 4 of the Elementary Education Act, 1880 (which relate to by-laws for the attendance of children at school), fourteen years shall be substituted for thirteen years." The effect of that section is to raise the age of exemption to fourteen for general educational purposes. At the same time it seems to me to be plain from the language used in the section that the Legislature did not intend to interfere with the provisions of the Act of 1899. Sect. 74 of the Elementary Education Act, 1870, which is referred to, empowers a school board, with the

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approval of the Education Department, to make by-laws providing for, among other things, the total or partial exemption of children between the ages of ten and thirteen years from school attendance. The age of ten was raised to twelve years by the Act of 1899, and s. 6, sub-s. 1, of the Act of 1900 has substituted fourteen years for thirteen. Sect. 4 of the Act of 1880, which is referred to in s. 6, sub-s. 1, of the Act of 1900, is a general enactment which prohibits the employment of a child under the age of thirteen years before the child has obtained a certificate entitling it to total or partial exemption from school attendance; and the effect of the above section of the Act of 1900 is to substitute fourteen years for thirteen. According to well-known principles of construction, inasmuch as s. 6, sub-s. 1, of the Act of 1900 expressly refers to two sections of two Education Acts dealing with by-laws as to school attendance and employment of children, and as no reference whatever is made to the Act of 1899, it must be taken that the provisions of this latter Act, which allow the local authority to make by-laws fixing thirteen years as the minimum age for total exemption from school attendance in the special case of children employed in agriculture, remain untouched. I am therefore of opinion that the decision of the justices is right, and that s. 1 of the Act of 1899, which was passed to allow a special exemption in the case of children employed in agriculture, has not been cut down or affected by the Act of 1900. The appeal must be dismissed.

BIGHAM J. I am of the same opinion. It is conceded on the part of the appellant that apart from s. 6, sub-s. 1, of the Elementary Education Act, 1900, the contention put forward on his behalf is not maintainable. In my opinion that section is not intended to affect, and does not affect, the provision in the Elementary Education (School Attendance) Act (1893) Amendment Act, 1899, as to the age for the employment of a child in agriculture. If the Legislature had any such intention when passing the later Act, there would be found in that Act an expression of that intention, and I can find none.

WALTON J. I agree. The offence charged here is the employment of a child under the age of fourteen years who has

not attained a certain standard of educational efficiency, contrary to s. 5 of the Elementary Education Act, 1876. That section prohibits the employment of children under the age of fourteen years who have not attained a certain standard of proficiency in education. At that date by-laws could only be made providing for the compulsory attendance of children at school up to the age of thirteen years, not fourteen years as now, but it was thought proper to prohibit the employment of children up to the age of fourteen years, except under certain conditions. The Elementary Education (School Attendance) Act (1893) Amendment Act, 1899, qualifies, and was intended to qualify, that provision of the Act of 1876 in the case of children who are to be employed in agriculture. Sect. 1 of the Act of 1899, after raising the minimum age of total or partial exemption from school attendance to twelve years, proceeds to deal with the case of children to be employed in agriculture in the second proviso, which I need not read again, as it has already been read by the Lord Chief Justice. The language does not seem to me to be quite clear, but I think that the words "exemption from school attendance" in the early part of that proviso must refer to total exemption, because partial exemption is dealt with in the later part of the proviso. At that date thirteen years was the age at which compulsory attendance at school was to cease, though children who had not attained a certain proficiency in education could not be employed until they were fourteen years of age. Therefore I think that the above proviso in its earlier part must be read as applying to children between the ages of thirteen and fourteen years who are to be employed in agriculture, and that special provision in the case of such children is not affected by s. 6, sub-s. 1, of the Elementary Education Act, 1900.

Appeal dismissed.

Solicitors for appellant: *King, Wigg & Co., for A. W. Venning, Liskeard.*

Solicitors for respondent: *Robbins, Billing & Co., for E. L. Marsack, Callington.*

NOTE.—Elementary Education Act, 1876 (39 & 40 Vict. c. 79), s. 4: "It shall be the duty of the parent of every child to cause such child to receive efficient

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elementary instruction in reading, writing, and arithmetic, and if such parent fail to perform such duty he shall be liable to such orders and penalties as are provided by this Act."

Sect. 5: "A person shall not take into his employment (except as hereinafter in this Act mentioned) any child—(1.) who is under the age of ten years; or (2.) who, being of the age of ten years or upwards, has not obtained such certificate either of his proficiency in reading, writing, and elementary arithmetic, or of previous due attendance at a certified efficient school, as is in this Act in that behalf mentioned, unless such child, being of the age of ten years or upwards, is employed and is attending school in accordance with the provisions of the Factory Acts, or of any by-law of the local authority (hereinafter mentioned) made under s. 74 of the Elementary Education Act, 1870, as amended by the Elementary Education Act, 1873, and this Act, and sanctioned by the Education Department."

Sect. 6: "Every person who takes a child into his employment in contravention of this Act shall be liable, on summary conviction, to a penalty not exceeding forty shillings."

Sect. 48: "A child in this Act means a child between the ages of five and fourteen years . . . ."

The other material enactments are the following:—

Elementary Education Act, 1870 (33 & 34 Vict. c. 75), s. 74: "Every school board may from time to time, with the approval of the Education Department, make by-laws for all or any of the following purposes: (1.) Requiring the parents of children of such age, not less than five years nor more than thirteen years, as may be fixed by the by-laws, to cause such children (unless there is some reasonable excuse) to attend school . . . . Provided that any by-law under this section requiring a child between ten and thirteen years of age to attend school shall provide for the total or partial exemption of such child from the obligation to attend school if one of Her Majesty's Inspectors certifies that such child has reached a standard of education specified in such by-law . . . ."

Elementary Education Act, 1880 (43 & 44 Vict. c. 23), s. 2, imposes an obligation on the local authority to make by-laws for the attendance of children at school under s. 74 of the Act of 1870.

Sect. 4: "Every person who takes into his employment a child of the age of ten and under the age of thirteen years, resident in a school district, before that child has obtained a certificate of having reached the standard of education fixed by a by-law in force in the district for the total or partial exemption of children of the like age from the obligation to attend school, shall be deemed to take such child into his employment in contravention of the Elementary Education Act, 1876, and shall be liable to a penalty accordingly."

Elementary Education (School Attendance) Act, 1893 (56 & 57 Vict. c. 51), s. 1: "The age at which a child may, in pursuance of any by-law made under the Elementary Education Acts, 1870 to 1891, obtain total or partial exemption from the obligation to attend school, on obtaining a certificate as to the standard of examination which he has reached, shall be raised to eleven, and every such by-law, so far as it provides for such exemption, shall be construed and have effect as if a reference to eleven years of age were

substituted therein for a reference to a lower age, and in s. 74 of the Elementary Education Act, 1870, eleven shall be substituted for ten."

Sect. 2: "If any person takes a child into his employment in such manner as to prevent the child from attending school in accordance with the by-laws for the time being in force in the district in which the child resides, he shall be deemed to take the child into his employment in contravention of the Elementary Education Act, 1876, and shall be liable to a penalty accordingly."

Elementary Education (School Attendance) Act (1893) Amendment Act, 1899 (62 & 63 Vict. c. 13), s. 1: "On and after the first day of January, 1900, the Elementary Education (School Attendance) Act, 1893, shall have effect as if 'twelve' were substituted therein for 'eleven' . . . . Provided also that the local authority for any district may, by by-law for any parish within their district, fix thirteen years as the minimum age for exemption from school attendance in the case of children to be employed in agriculture, and that in such parish such children over eleven and under thirteen years of age, who have passed the standard fixed for partial exemption from school attendance by the by-laws of the local authority, shall not be required to attend school more than 250 times in any year. Such by-law shall have effect as a by-law made under s. 74 of the Elementary Education Act, 1870, and all Acts amending the same. The local authority shall be the local authority fixed by s. 7 of the Elementary Education Act, 1876 . . . ."

Elementary Education Act, 1900 (63 & 64 Vict. c. 53), s. 6: "(1.) In s. 74 of the Elementary Education Act, 1870, and in s. 4 of the Elementary Education Act, 1880 (which relate to by-laws for the attendance of children at school), fourteen years shall be substituted for thirteen years . . . ."

W. F. B.

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Jan. 21.

JOHNSON *v.* NEEDHAM.

Criminal Law—Cruelty to Animals—Irregularity in Form of Summons—More than one Offence charged—Election by Prosecution on what Charge to proceed—Cruelty to Animals Act, 1849 (12 & 13 *Vict. c.* 92), *s.* 2.

The Cruelty to Animals Act, 1849, s. 2, enacts that "if any person shall . . . . cruelly . . . . ill-treat, ... abuse, or torture . . . . any animal" he shall be liable to a penalty:—

Held, that the words "ill-treat," "abuse," and "torture" create three separate offences, and that therefore a conviction for "ill-treating, abusing, and torturing" would be bad.

When a summons is issued under s. 2 of the Cruelty to Animals Act, 1849, the justices cannot decline to proceed merely on the ground that the summons is irregular in form or is open to objection on the ground of an alleged defect. They should hear the evidence, but when it has been given they must make up their minds whether an offence under the summons has been proved, and at that stage it is not placing too great a burden on the prosecutor to ask him to specify the offence which he alleges the evidence supports.

Case stated by justices for the county of Derby.

An information was preferred by Johnson, the appellant, under the Cruelty to Animals Act, 1849, s. 2 (1), against the respondent for that the respondent on July 16, 1908, in the parish of Flagg, in the said county, did cruelly ill-treat, abuse, and torture a certain animal, to wit, a grey gelding.

At the hearing of the information the appellant produced evidence in support of his information, and the respondent evidence in opposition, the evidence on both sides being completed. Upon retiring to consider their decision upon the merits of the case the justices noticed for the first time that the information laid by the appellant was not worded in the language of the statute, inasmuch as in the information the word "and" connected the words "abuse" and "torture," while the language of the Cruelty to Animals Act, 1849, s. 2, is "abuse, or torture." They were of opinion that the information was for three offences

(1) Cruelty to Animals Act, 1849, s. 2: "If any person shall from and after the passing of this Act cruelly beat, ill-treat, over-drive, abuse, or torture, or cause or procure to be cruelly beaten, ill-treated, over-driven, abused, or tortured, any animal, every such offender shall for every such offence forfeit and pay a penalty not exceeding five pounds."

within the meaning of s. 10 of the Summary Jurisdiction Act, 1848, the words "abuse" and "torture" constituting two separate offences not necessarily involved in the commission of an act of cruelty within the meaning of the statute, and that it was the duty of the appellant to elect under which of the charges he wished to proceed. The respondent's solicitor had not called the attention of the justices to the defect in the information during the hearing of the case, but they considered that it was their duty to point out to the parties what appeared to be a fatal defect in the information. They thereupon returned into Court and drew the attention of the appellant to the matter, and called upon him to elect upon which portion of the information he would proceed, and stated that they were prepared thereafter to rehear the case. The appellant declined to elect, but argued that the justices had no power to require him to do so. In the circumstances they considered that they could not deal with the matter and they dismissed the information.

The question for the opinion of the Court was whether the justices came to a correct determination in point of law. If the Court should be of opinion that the determination was right, the information was to stand dismissed; if not, the Court was requested to remit the case to them with directions to hear and determine the same according to law.

Patrick Hastings, for the appellant. The justices were wrong. They considered that the information disclosed a series of offences because it followed the language of s. 2 of the Cruelty to Animals Act, 1849. In that section the words "abuse" and "torture" are merely explanatory of "ill-treat." In *Rex* v. *Wells* (1) there had been a conviction, and that case is therefore distinguishable. *Reg.* v. *Totnes Justices* (2) is in the appellant's favour. It appears from *Bartholomew* v. *Wiseman* (3) that the rule nisi in *Reg.* v. *Totnes Justices* (2) was subsequently made absolute. Sect. 2 of the Cruelty to Animals Act, 1849, only creates two offences, namely, to "cruelly beat," and to "ill-treat." To "over-drive" is to ill-treat. Ill-treating and over-driving therefore constitute one

(1) (1904) 68 J. P. 392. (2) (1879) *Times* newspaper, May 9.
(3) (1891) 56 J. P. 455.

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offence, and the remaining words of the section are merely descriptive of ill-treating.

The respondent did not appear.

LORD ALVERSTONE C.J. I am of opinion that we ought not to interfere with the decision of the justices. All the evidence had been taken. When a summons is issued under s. 2 of the Cruelty to Animals Act, 1849, the justices cannot decline to proceed merely on the ground that the summons is irregular in form or is open to objection on the ground of an alleged defect. They should hear the evidence, but when it has been given they must make up their minds whether an offence under the summons has been proved, and at that stage it is not placing too great a burden on the prosecutor to ask him to specify the offence which he alleges the evidence supports. But the present application practically amounts to a contention that there ought to be a conviction in the words "ill-treat, abuse, and torture." That raises the question whether the words "abuse, or torture" in s. 2 of the Cruelty to Animals Act, 1849, are only descriptive of the consequences of the ill-treatment and are not to be construed as creating separate offences. On behalf of the appellant it was contended that a conviction in the words "ill-treat, abuse, and torture" would be good upon the ground that these words create only one offence. It is impossible to come to that conclusion. In my opinion it was not the intention of the Legislature that the words "abuse, or torture" should be coupled with the word "ill-treat" so as to create only one offence. The intention was that it shall be an offence either cruelly to ill-treat or to abuse or to torture an animal. It would be contrary to the principles of our criminal law to say that a conviction for "ill-treating, abusing, and torturing" would be good on the ground that it is for only one offence. The decision in *Reg.* v. *Totnes Justices* (1) cannot be treated as an authority in support of the contention that a conviction for "ill-treating, abusing, and torturing" would be a good conviction. In that case no question arose as to what the conviction ought to have been for upon the evidence, and therefore

(1) (1879) *Times* newspaper, May 9.

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no question arose as to the election by the prosecution as to the charge upon which they would proceed. In the present case, as the appellant asked for a conviction in the terms "ill-treat, abuse, and torture," and was not content with a conviction for one of the offences of ill-treating or abusing or torturing, the justices were right, and this appeal cannot succeed.

BIGHAM J. I agree.

WALTON J. I am of the same opinion.

Appeal dismissed.

Solicitor for appellant: *S. G. Polhill.*

J. E. A.

HOLLIS *v.* YOUNG.

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April 1.

Wild Birds—"Recently taken"—Larks—Evidence—Wild Birds Protection Act, 1880 (43 & 44 *Vict. c.* 35), *s.* 3—*Wild Birds Protection Act*, 1881 (44 & 45 *Vict. c.* 51), *s.* 2.

On the hearing of an information charging the defendant with knowingly and wilfully having in his possession certain wild birds recently taken contrary to s. 3 of the Wild Birds Protection Act, 1880, the evidence for the prosecution shewed that on July 30 the defendant, a dealer in wild birds, had on his premises in seven cages seven young larks; that they were very wild, beating themselves against the bars of the cages; and that their feathers were of a light colour.

The magistrate at the hearing, without calling on the defendant, dismissed the information on the ground that there was no evidence that the birds were "recently taken" within the meaning of the above enactment:—

Held, that there was evidence that the birds were recently taken within the meaning of the enactment, and that the magistrate was wrong in dismissing the information without calling on the defendant.

CASE stated by a metropolitan police magistrate.

The appellant was an inspector of the Society for the Prevention of Cruelty to Animals. The respondent was a dealer in wild birds.

An information was laid by the appellant charging the respondent that he did on July 30, 1907, knowingly and wilfully have

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in his possession certain wild birds, to wit, seven young larks, recently taken, contrary to the statutes in that case made and provided, namely, the Wild Birds Protection Acts, 1880 and 1881. (1)

The following evidence was given on behalf of the prosecution: —On July 30, 1907, in consequence of information received, the appellant, accompanied by another man, visited the respondent's premises. He found there a large number of wild birds, including a number of larks. Amongst the larks he noticed seven young larks in separate cages, which he considered were that year's birds, recently taken, because they were very wild, beating themselves against the bars of the cages, and their feathers were of a light colour. The other larks were old birds, and he did not think that they were recently taken, as they were quiet and appeared to have been in captivity for some time.

The appellant stated that he had lived in the country as a boy and had some knowledge of wild birds, and could easily distinguish between old and young larks, and that he had no doubt whatever that the seven larks in question were young birds.

Another witness, also an inspector of the Society for the Prevention of Cruelty to Animals, said that he had noticed that the larks were of light plumage, that they were wild in the cages when he inspected them, and that in his opinion they were young birds.

No evidence was called to shew how or when the birds came into the possession of the respondent.

The magistrate's attention was called to the case of *Green* v.

(1) Wild Birds Protection Act, 1880, s. 3: "Any person who between the first day of March and the first day of August in any year after the passing of this Act shall knowingly and wilfully shoot or attempt to shoot, or shall use any boat for the purpose of shooting or causing to be shot, any wild bird, or shall use any lime, trap, snare, net, or other instrument for the purpose of taking any wild bird, or shall expose or offer for sale, or shall have in his control or possession after the fifteenth day of March, any wild bird recently killed or taken, shall, on conviction of any such offence before any two justices of the peace in England and Wales or Ireland, or before the sheriff in Scotland, in the case of any wild bird which is included in the schedule hereunto annexed, forfeit and pay for every such bird in respect of which an

Carstang (1) as an authority that the onus of proving that the birds were recently taken lay upon the prosecution. He came to the conclusion that there was no evidence before him that the seven larks in question were recently taken. He therefore dismissed the information without calling on the respondent, but stated for the opinion of the Court a case in which the foregoing facts were set out, the question being whether he was right in dismissing the information without calling on the respondent.

Stuart Bevan, for the appellant.
The respondent did not appear.

LORD ALVERSTONE C.J. In this case the magistrate thought that there was no prima facie evidence that the birds were recently taken. The date on which the respondent was found with the birds in his possession was July 30, 1907. The birds were young larks. The close season is from March 1. It is common knowledge that it is possible to find in the month of July larks quite recently hatched. In addition to that it is stated that these were young birds and that they were wildly beating themselves against the bars of the cages, and that their feathers were of a very light colour. In these circumstances it is clear to my mind that there was evidence, whatever the answer may be, that these birds were recently taken, and that the magistrate ought therefore to have considered the case and not dismissed it on the ground that there was no evidence. The case must therefore go back to the learned magistrate.

RIDLEY and DARLING JJ. concurred.

Appeal allowed.

Solicitor for appellant: *S. G. Polhill.*

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offence has been committed a sum not exceeding one pound . . . . "

Wild Birds Protection Act, 1881, s. 2: "The schedule to the Wild Birds Protection Act, 1880, shall be read and construed as if the word 'Lark' had been inserted therein."

(1) (1901) 85 L. T. 615.

W. H. G.

1909
Jan. 21.

EATON *v.* BEST.

Drunkenness—"Habitual Drunkard"—Person incapable of managing own Affairs when drunk—Habitual drinking to excess—Capacity to manage own Affairs when sober—Habitual Drunkards Act, 1879 (42 & 43 *Vict. c.* 19), *s.* 3—*Inebriates Act*, 1898 (61 & 62 *Vict. c.* 60), *s.* 2, *sub-s.* 1.

The expression "habitual drunkard" in s. 3 of the Habitual Drunkards Act, 1879, and s. 2, sub-s. 1, of the Inebriates Act, 1898, applies to a person who habitually drinks to excess, and who is, when drunk, dangerous or incapable of managing himself or his affairs, even though when sober he is capable of managing himself and his affairs.

Case stated by the stipendiary magistrate for the city and county of Kingston-upon-Hull.

At a Court of summary jurisdiction complaint was made by the appellant, William Eaton, that the respondent, Arthur Best, "having within the twelve months preceding the date next hereinafter mentioned been convicted summarily at least three times of an offence mentioned in the First Schedule to the Inebriates Act, 1898, and being a habitual drunkard within the meaning of the Inebriates Acts, 1879 to 1898, unlawfully was on August 8, 1908, found drunk and incapable in Spring Street, at 4.40 p.m."

At the hearing of the complaint the following facts were proved or admitted:—On August 8, 1908, the respondent was found drunk in the highway, and within the twelve months preceding the date of the commission of the offence the respondent had been convicted summarily three times of other offences which are mentioned in the First Schedule to the Inebriates Act, 1898. The respondent (whose age was about thirty-five) was given to drink, and had been so for twelve or fourteen years; through drink he lost his situation when working for his brother, a drysalter, some years ago, since when the only employment he had been able to get had been on docks; he would sometimes be drunk three or four times in one week, and at other times he would keep sober for four or five weeks; there had been no improvement latterly. When drunk he was more like a lunatic than a human being and did not appear to know what he was doing; he was separated

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from his wife six or seven years ago because of his drinking habits. When he was sober he was, in the words of his father, "as right as any one," and knew what he was doing; he had been seen apparently dazed the day after drinking heavily, but not more dazed than any other person would be who had consumed as much alcohol, and his condition was no more peculiar than that of any other person who had been equally drunk. Nothing was noticed in the respondent attributable to a course of drinking, and his father stated that he would give his son money and send him out to do any business if he were sober.

By s. 2, sub-s. 1, of the Inebriates Act, 1898, it is enacted that "any person who commits any of the offences mentioned in the First Schedule to this Act, and who within the twelve months preceding the date of the commission of the offence has been convicted summarily at least three times of any offences so mentioned, and who is a habitual drunkard, shall be liable upon conviction on indictment, or if he consents to be dealt with summarily on summary conviction, to be detained for a term not exceeding three years in any certified inebriate reformatory the managers of which are willing to receive him." Sect. 3 of the Habitual Drunkards Act, 1879, provides that "'Habitual drunkard' means a person who, not being amenable to any jurisdiction in lunacy, is, notwithstanding, by reason of habitual intemperate drinking of intoxicating liquor, at times dangerous to himself or herself or to others, or incapable of managing himself or herself, and his or her affairs."

On the part of the appellant it was contended that the respondent was a habitual drunkard within the meaning of the definition in the Habitual Drunkards Act, 1879, inasmuch as he was "by reason of habitual intemperate drinking of intoxicating liquor . . . . incapable of managing himself . . . . and his . . . . affairs." In support of this view it was argued that the words "at times dangerous," &c., or "incapable," &c., were inserted as a guide to the Court by way of definition of what drunkenness was, and not what the effect of drunkenness might be; that if the latter, they were insufficient and unnecessary; and *Robson* v. *Robson* (1) was referred to. It was further contended, on the authority of

(1) (1904) 68 J. P. 416.

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Reg. v. *Shaw* (1), *In re Dewhirst's Trusts* (2), *In re Martin's Trusts* (3), and *In re Barber* (4), that persons "at times dangerous," &c., or "incapable," &c., if not habitual drunkards, were amenable to jurisdiction in lunacy. It was also urged that if it was proved that a man had been convicted three previous times and was habitually intemperate, then his incapacity to manage himself and his affairs was proved at the same time, because he was habitually intemperate. It was also contended that if the strict interpretation of the definition was the right one it would not be giving the statute a reasonable meaning, as the only persons who would come within its purview would be those whose brains were already affected, and that it would be of no use sending them to inebriate reformatories.

As no arguments were adduced on behalf of the respondent, the magistrate stated those which occurred to him in answer to the contentions put forward on behalf of the appellant. He was not satisfied that the case of *Robson* v. *Robson* (5) bound him, for there the point was not taken as to whether the man's condition was the result of the habitual character of his drinking or only due to a particular preceding bout; the question was one of fact as to whether the man's drunkenness, which the justices had found to be habitual, was or was not habitual. Regarding *Reg.* v. *Shaw* (1), *In re Dewhirst's Trusts* (2), *In re Martin's Trusts* (3), and *In re Barber* (4), in which the question whether trustees suffering from paralysis, softening of the brain, and the like, were of unsound mind was dealt with, these authorities seemed to him not to touch the point intended to be made. The argument founded on convictions coupled with habitual intemperance seemed also to have no application. The question in the present case was a different one. It was, "Is this man a habitual drunkard?" Had the prosecution succeeded in proving that the respondent's incapacity on sundry occasions was caused by the habitual character of his drinking habits, or was it only because he was then drunk? See 46 S. J. 644. There were no symptoms of permanent mischief from alcohol; on

(1) (1868) L. R. 1 C. C. R. 145.
(2) (1886) 33 Ch. D. 416.
(3) (1887) 34 Ch. D. 618.
(4) (1888) 39 Ch. D. 187.
(5) 68 J. P. 416.

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the contrary, when he was not drunk he was said to be "as right as any one." He was of opinion that the appellant had failed to prove his case, and he dismissed the complaint.

The question upon which the opinion of the Court was desired was whether the magistrate upon the above statement of facts came to a correct determination in point of law.

McCardie, for the appellant. The Inebriates Act, 1898, contains no definition of "habitual drunkard," but by s. 30 it is to be "construed as one with the Inebriates Acts, 1879 and 1888," and the definition of "habitual drunkard" contained in s. 3 of the Act of 1879 means a person who is in the habit of getting drunk, and who when he is drunk is incapable of managing his own affairs. The case of a person who is amenable to the jurisdiction of the Lunacy Commissioners is excluded. In *Robson* v. *Robson* (1) the evidence was practically the same as in the present case and the person was held to be a habitual drunkard. The object of the Act of 1898 would be defeated if the ruling of the magistrate is correct. [Stone's Justices' Manual, 39th ed., p. 261, note (k), was also referred to.]

G. F. Mortimer, for the respondent. The magistrate was right. The definition in s. 3 of the Habitual Drunkards Act, 1879, does not say that a man who is constantly drunk over a period of years is a habitual drunkard. Grave consequences attach where a person is held to be a habitual drunkard, and the definition is therefore carefully worded. In the present case there were no symptoms of permanent mischief from alcohol. The respondent's incapacity was not the result of habitual drinking, but of the particular bout. Penal consequences follow as the result of being held to be a habitual drunkard, and the respondent is therefore entitled to the benefit of any reasonable doubt in his favour. The legislation was directed to the cases of persons who are more or less incapable mentally as the result of their drinking. It does not point to a particular drinking bout. The words "not being amenable to any jurisdiction in lunacy" in the definition of "habitual drunkard" in s. 3 of the Inebriates Act, 1879, imply that although the person is not actually a

(1) 68 J. P. 416.

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lunatic he must not be in the full possession of his senses when he is sober. As the respondent was "as right as any one" when he was sober, he was not a "habitual drunkard" within the definition contained in s. 3 of the Habitual Drunkards Act, 1879.

LORD ALVERSTONE C.J. There is no reasonable doubt that on the description of the respondent as set out in the case he is a habitual drunkard in the ordinary meaning of the term; but on his behalf it is contended that he is not to be treated as one within the meaning of s. 2 of the Inebriates Act, 1898, because the definition of "habitual drunkard" in s. 3 of the Habitual Drunkards Act, 1879, is too narrow to include him. That section provides that the expression "habitual drunkard" means "a person who, not being amenable to any jurisdiction in lunacy,"—which, in my opinion, excludes persons who are incapable of managing their affairs when sober—"is, notwithstanding, by reason of habitual intemperate drinking of intoxicating liquor, at times dangerous to himself or herself or others, or incapable of managing himself or herself, and his or her affairs." The management by the respondent of his affairs was at times lamentable. In my opinion we ought not to cut down the meaning of the definition in the way contended for on his behalf and say that it does not apply to a person who in the intervals between the bouts of drinking is a sober man. I think the definition means a man who by habitual drinking is habitually in a condition of not being capable of managing his own affairs. In my judgment the Court ought not to say that he is not a habitual drunkard because when sober he is capable of managing his own affairs. The case must therefore be sent back to the magistrate to be dealt with.

BIGHAM J. I agree.

WALTON J. I am of the same opinion.

Case remitted.

Solicitors for appellant: *Sharpe, Pritchards & Co., for E. Laverack, Hull.*

Solicitors for respondent: *C. J. Smith & Hudson, for Payne & Payne, Hull.*

J. E. A.

LONDON COUNTY COUNCIL *v.* WATNEY, COMBE & CO.

1909
Feb. 3.

Licensing Acts — Compensation Charge—Deduction from Rent — Date from which Unexpired Portion of Term is to be counted—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *s.* 3 ; *Sched. II.*

The date at which the length of the "unexpired term" referred to in Sched. II. of the Licensing Act, 1904, is to be ascertained is October 10, the date on which the compensation charge is payable by the licence-holder.

APPEAL from the Westminster County Court.

The defendants, Watney, Combe & Co., were tenants to the plaintiffs of certain licensed premises under a lease for eighty years expiring at Michaelmas, 1967. In 1891 the defendants had sub-let the premises to the occupying tenant for a term of thirty-five years from March 25, 1891, which term would expire at Lady Day, 1926. The quarter sessions, acting under s. 3, sub-s. 1, of the Licensing Act, 1904 (1), fixed the compensation charge in respect

(1) By s. 3, sub-s. 1, of the Licensing Act, 1904, "Quarter sessions shall in each year . . . . for the purposes of this Act impose in respect of all existing on licences renewed in respect of premises within their area charges at rates not exceeding and graduated in the same proportion as the rates shown in the scale of maximum charges set out in the First Schedule to this Act."

Sub-s. 2: "Charges payable under this section in respect of any licence shall be levied and paid together with and as part of the duties on the corresponding excise licence" (i.e., on October 10: see s. 16 of the Excise Licences Act, 1825 (6 Geo. 4, c. 81)).

Sub-s. 3: "Such deductions from rent as are set out in the Second Schedule to this Act may notwithstanding any agreement to the contrary be made by any licence-holder who pays a charge under this section and also by any person from whose rent a deduction is made in respect of the payment of such a charge."

"SCHEDULE II.

"*Scale of Deductions.*

"A person whose unexpired term does not exceed	1 year	may deduct a sum equal to	100 per cent. of the charge.
,, ,,	2 years	,,	88 ,, ,,
. .	. .	. .	. .
,, ,,	19 ,,	,,	17 ,, ,,
. .	. .	. .	. .
Exceeds 55 but does not exceed	60 ,,	,,	1 ,, ,, ,,

Those whose unexpired term exceeds sixty years are not allowed by the Act to make any deduction.

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of the said premises at the sum of 50*l*. This charge for the year 1907 became payable on October 10, and the licence-holder paid it on October 24, 1907. As his sub-lease had then a term not exceeding nineteen years to run, he was entitled, under Sched. II., to deduct 17 per cent. of the charge from his rent, and accordingly, when paying his Michaelmas rent on November 25, he deducted 8*l*. 10*s*. therefrom. The defendants on January 13, 1908, when paying to the plaintiffs the rent due from them at Christmas, 1907, deducted therefrom 10*s*., being 1 per cent. of the 50*l*. compensation charge, as being the amount of deduction allowed by the schedule in respect of a term which had between fifty-nine and sixty years to run. They claimed that the date at which the unexpired period of the term was to be ascertained was either October 10, when the charge was payable by the licence-holder, or else November 25, the date when the licence-holder paid the Michaelmas rent to the defendants and made a deduction from that rent in respect of the payment of the charge. The plaintiffs claimed that the date at which the period of the unexpired term was to be ascertained was April 5, being the first day of the licensing year, the day from which the justices' licences began to run; and that, as on the preceding April 5 the defendants had more than sixty years of their term unexpired, they were not entitled to deduct any part of the charge. The plaintiffs having brought an action to recover the 10*s*. as rent in arrear, the county court judge held that the date on which the period was to be ascertained was November 25, and that the defendants were consequently entitled to deduct the 10*s*. from the rent. He accordingly gave judgment for the defendants. The plaintiffs appealed.

Ryde, for the plaintiffs. The date from which the unexpired term should be computed is April 5. The benefit, which is the consideration for the payment of the compensation charge, is the renewal of the licence, and the extent of that benefit must be measured from the date from which the licence runs, namely, April 5. The charge is, no doubt, actually payable on October 10, but that is merely for convenience of collection in the interest of the revenue authorities. The amount that is deductible from

the rent cannot be computed from that date, for, if it were, the object of the Act would be defeated, which was to make the parties interested in the licensed premises share the burden of the charge in proportion to the extent of their interest. Take the case of a tenant under a Michaelmas tenancy, whose term would expire at Michaelmas, 1908. If the defendants are right, and the period is to be calculated from October 10, the tenant would on October 10, 1907, have less than a year unexpired, though he clearly would be interested to a considerable extent in the licence for the year 1908, in consideration for which the 1907 compensation charge was paid. The same objection applies to the calculation of the unexpired term from the date of the payment of the rent.

Acland, K.C., and *Bruce Williamson*, for the defendants. The period is to be calculated from the date when the duty is payable, namely, October 10. Two things must have happened before a deduction from rent can be made—October 10 must have passed, and the charge must have been paid; and as the charge ought to be paid on October 10, it is presumably to that date that the unexpired term is referable. The result of the contention of the other side would be that a tenant for a term of ten years commencing at Midsummer would immediately upon his entry have an unexpired term of more than ten years, because you would have to go back to the preceding April 5. Sched. II. must be read along with s. 3, sub-s. 3, and the proper way to read them is, "A licence-holder who pays a charge under this section and whose unexpired term does not exceed —— years may deduct —— per cent. of the charge." That must refer to the time when he pays or ought to pay the charge, and not to a time when he could not have paid it, for the revenue authorities would not have received it on the preceding April 5.

Ryde, in reply.

Feb. 3. BIGHAM J. read the following judgment:—The question which we have to determine in this case is at what period the "unexpired term" mentioned in Sched. II. to the Licensing Act, 1904, is to be ascertained. Is it to be ascertained as of April 5, from which date the magistrates' licence runs, or as

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Bigham J.

of October 10, from which date the excise licence runs; or is it to be ascertained as of the date when the next payment of rent falls due after the payment of "the charge" referred to in the schedule? As the percentage of the charge which the tenant is entitled to deduct when paying his rent to his landlord depends upon the length of the tenant's "unexpired term," it becomes important to determine the point of time as from which the length of the unexpired term is to be calculated. The answer to this rather complicated question depends upon the meaning of s. 3, sub-s. 3, of the Act when read with the words of Sched. II. Sub-s. 1 of s. 3 provides for the annual imposition by quarter sessions of certain charges in respect of all existing on licences renewed in respect of premises within their area. The fund formed by the payment of these charges is to be distributed among the persons whose licences may not have been renewed as compensation for the loss sustained by reason of the refusal to renew. By sub-s. 2 of s. 3 the charges so imposed are to be levied and paid together with, or as part of, the duties on the corresponding excise licence. It is the tenant in possession who pays for the excise licence, and the payment for such licence is due annually on October 10. Then by sub-s. 3 it is provided that the licence-holder who has paid the charge may make a deduction from his rent in respect of the payment of the charge, and the landlord may in his turn make a deduction if his tenure obliges him to pay rent to a superior landlord. The rate of such deduction is fixed by Sched. II., the operative words of which are "a person whose unexpired term does not exceed —— years may deduct a sum equal to —— per cent. of the charge." The percentage of deduction decreases with the length of the unexpired term. Thus a person whose term has not more than one year to run is entitled to deduct from his rent the whole (or 100 per cent.) of the charge, whereas a person whose term has twenty years to run can only deduct 15 per cent., and a person whose term exceeds sixty years cannot deduct any part of the charge. It will thus be seen that the amount to be deducted may be affected by the date at which the length of the unexpired term is to be ascertained. Mr. Ryde contends that, as the charge is imposed on the holders of justices' licences running for twelve months from April 5, it is right to

take that date as the date from which to calculate the unexpired term. On the other hand Mr. Acland says that the date when the charge is payable, October 10, or the date when the next rent is payable must be taken. It is admitted that whichever date is taken anomalous cases will result. Thus little if any assistance is to be obtained from considering the results which may arise from taking this or that date. I prefer therefore to look only at the words of the statute and to put upon them the best interpretation I can. There are no words in the statute directly supporting Mr. Ryde's construction. Nor do I find anything which in my opinion even points to an intention that the date of the on licence should be taken as the date from which the unexpired term is to be calculated. On the other hand I think there is something to be found in the Act which supports the other contention. Sub-s. 2 of s. 3 fixes the date when the tenant is to pay the charge, October 10, and sub-s. 3 creates the right to make the deduction and declares that the right shall become effective on the charge being paid. I think the date when the right to deduct comes into existence, namely, October 10, must be taken also as the date with reference to which the amount of the deduction is to be ascertained.

WALTON J. I agree. The Act of 1904 had primarily this effect, that it gave to all licence-holders the benefit of an additional security for the renewal of their licences. It also provided that where, under certain conditions, a licence was not renewed, compensation should be paid to the holder of that licence in respect of its non-renewal. That compensation, which was to be paid as the consideration for the benefit which licence-holders received, was to be derived from an annual charge imposed on all existing licence-holders; and that charge must, according to the decisions, be taken to be a charge for the licensing year beginning on April 5 and expiring on the following April 5, that being the date from which the justices' licence runs for one year. That being so, provision had to be made with respect to the persons who were to bear that charge, and the Act accordingly provided that it should be borne by the persons interested in the licence. It has to be paid in accordance with

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Walton J.

the terms of the Act on October 10 by the licence-holder, but it is to be borne by the persons interested in the licence; and, further, I agree with Mr. Ryde that the scheme of the Act was that it should be borne by those persons in proportion to the extent of their interest, and that Sched. II. is framed upon that footing. Having regard to what appears to be the scheme of the Act and the principle upon which the scale in that schedule is framed, if it was our business to redraft it so as to give accurate effect to what I believe to be the intention of the Legislature, I should be inclined to adopt Mr. Ryde's contention. However, we have not only to look at the general intention of the Legislature, but at the actual words of the Act and schedule, which shew precisely how the Legislature has prescribed that its intention shall be carried out. The words of the schedule are "A person whose unexpired term does not exceed —— years may deduct a sum equal to —— per cent of the charge." If leases of licensed premises all began on April 5, there would be no difficulty at all in working out the scheme of the Act. Take by way of illustration the case of a tenant whose term has upon April 5 exactly a year to run and no more. The schedule says that where the unexpired term "does not exceed one year" he may deduct "100 per cent."—that is to say, he gets a return of the whole of the charge. And in the case supposed it would be only fair that he should do so, for he would have no interest at all in the renewal of the licence on the following April 5, and therefore ought to bear no part of the charge. But, unfortunately, leases of licensed premises do not all run from April 5. If you take the case of a licence-holder whose term began on some date after April 5 and before October 10, and at such date has a year to run and no more, he has an interest in the next renewal, because his term will extend beyond the next April 5. It would consequently be not unfair that he should bear part of the charge. And, unless we adopt Mr. Ryde's contention that the unexpired term should be measured from the preceding April 5, such a person will bear no part of the charge although he will get some benefit. That is a contention to which I cannot help attaching very great weight. But the words of the schedule are "A person *whose* unexpired term does not exceed," &c., and if we are to give

effect to Mr. Ryde's contention, in the case which I put of a term for one year and no more commencing between April 5 and October 10, we should have to treat the tenant's term as commencing on April 5 and thus extending over a period when in fact he had no term at all. I do not think we can read the words in that sense. And if we do not so read them, the only other alternatives are either to read them as meaning that the unexpired term is to be counted from October 10, when the charge becomes payable, or else as meaning that it is to be counted from the date when the rent of the licence-holder who pays the charge is payable, or, in the case of a mesne tenant from whose rent a deduction has already been made, the date on which his rent is payable. If we were to adopt the latter construction, it appears to me that the date would be so uncertain that it cannot have been the intention of the Legislature that the unexpired term should be counted from such a date. It seems to me that the natural date is that on which the charge is payable, namely, October 10, and the words of the schedule must be read as if they were "whose unexpired term on October 10 does not exceed," &c. I agree that the appeal must be dismissed.

Appeal dismissed.

Solicitor for London County Council: *E. Tanner.*
Solicitor for Watney, Combe & Co.: *A. H. Macpherson.*

J. F. C.

C. A.

1909

Feb. 11.

[IN THE COURT OF APPEAL.]

THE KING *v.* HIS HONOUR JUDGE SNAGGE AND OTHERS.

County Court—Practice—Judgment Summons—Default in Appearance—Fine—Application of Fine in reduction of Judgment Debt—Jurisdiction—County Courts Act, 1888 (51 & 52 *Vict. c.* 43), *s.* 111—*County Court Rules*, 1903 *and* 1904, *Order* XXV., *r.* 31 (3A).

By s. 111 of the County Courts Act, 1888, as applied by Order XXV., r. 31 (3A), of the County Court Rules, 1903 and 1904, to a judgment summons, a judgment debtor is liable to a fine for refusing or neglecting, without sufficient cause, to appear at the hearing of a judgment summons, "and the whole or any part of such fine, in the discretion of the judge, after deducting the costs, shall be applicable towards indemnifying the party injured by such refusal or neglect":—

Held, that the judge has no jurisdiction to apply the fine in reduction of the judgment debt.

APPEAL from the discharge of two orders nisi for prohibition and certiorari by the Divisional Court (Lord Alverstone C.J., Darling and Sutton JJ.)

The substantial question raised by this appeal was as to the power of a county court judge who has fined a judgment debtor for neglecting to appear at the hearing of a judgment summons issued under the Debtors Act, 1869, to direct that the fine shall be applied in reduction of the judgment debt.

By s. 111 of the County Courts Act, 1888, "every person summoned as a witness, either personally or in such other manner as shall be prescribed, to whom at the same time payment or a tender of payment of his expenses shall have been made on the prescribed scale of allowances, and who shall refuse or neglect, without sufficient cause, to appear . . . . shall forfeit and pay such fine, not exceeding ten pounds, as the judge shall direct; and the whole or any part of such fine, in the discretion of the judge, after deducting the costs, shall be applicable towards indemnifying the party injured by such refusal or neglect, and the remainder thereof shall be accounted for by the registrar to the treasurer."

By the County Court Rules, 1903 and 1904, Order XXV.,

r. 31 (3A), "a judgment summons shall be deemed to be a summons to a witness within the meaning of section one hundred and eleven of the Act."

On October 17, 1905, George Bidmead obtained a judgment in the county court of Oxfordshire against James Durbridge for 8*l.* 17*s.* 6*d.*

Default having been made in payment, on October 9, 1906, a judgment summons under the Debtors Act, 1869, was issued against the debtor, directing him to attend on November 17 to be examined on oath as to his means.

On November 17, 1906, the debtor having made default in appearance, according to the certified copy of the entry in the registrar's minute-book (which was not before the Divisional Court), the following order was made:—"Adjourned to next Court. Defendant fined 4*l.* for non-attendance on subpœna payable 1st December, 1906. Judge ordered fine 4*l.* when recovered to be paid to plaintiff in reduction of debt."

The order as drawn up merely ordered payment of the fine to the registrar and contained no direction as to the application of the fine.

The evidence of the county court judge before the Divisional Court as to the order which he made was as follows: "The said James Durbridge was described in the judgment summons as a 'retired farmer' then residing at Norreys Avenue, Oxford. On the 17th day of November, the return day of the said judgment summons, the judgment debtor failed to appear when called in the Court at the County Hall, Oxford; I thereupon ordered that the said James Durbridge should pay a fine of 4*l.* for having neglected without any cause shewn to appear at the Court. I was satisfied that the plaintiff was damnified by the non-attendance of this retired farmer then residing at Norreys Avenue in the city of Oxford and by the consequent absence of such proof of means as might have resulted from his examination by the Court. I directed therefore that the amount of the fine when recovered should be applied towards indemnifying the plaintiff and I adjourned the further hearing of the judgment summons to the 19th of January, 1907." The learned county court judge then stated the subsequent proceedings hereinafter

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set out, which shewed that the money was in fact applied in reduction of the debt.

On January 4, 1907, the debtor, after the issue of a commitment order, paid 4*l.* 6*s.*, the amount of the fine and costs, into Court.

On October 11, 1907, the debtor, after having been examined as to his means and after the issue of a commitment order, paid into Court the sum of 5*l.* 13*s.* 9*d.* therein named, representing the balance of the debt and costs after deducting the 4*l.*

On October 23, 1907, the plaintiff's solicitors applied for payment out of the total sum in Court, 9*l.* 19*s.* 9*d.* The above matters were shortly afterwards brought to the notice of the Treasury, who objected that the county court judge had no power under s. 111 of the County Courts Act, 1888, as applied by Order xxv., r. 31 (3A), of the County Court Rules, 1903 and 1904, to make the order of November 17, 1906.

On January 27, 1908, the Treasury obtained orders nisi for prohibition and certiorari in respect of the order of November 17, 1906, against the county court judge, the registrar, and the plaintiff in the action.

On May 25, 1908, the Divisional Court discharged these orders.

The Treasury appealed and asked that the orders should be made absolute.

S. A. T. Rowlatt, for the appellants. A county court judge has no power under s. 111 of the County Courts Act, 1888, as applied by the County Court Rules to a judgment summons, when imposing a fine upon a debtor for non-appearance at the hearing of a judgment summons, to order that the fine shall be applied in reduction of the debt. The order for a fine is a punitive order, and the indemnification to the plaintiff must be limited strictly to the loss incurred by the witness's non-attendance. If the practice objected to is allowed the debtor is not fined, because he is merely ordered to pay an instalment of his debt, which he was bound to pay in any case, and the creditor actually suffers under a section intended to benefit him, for he is merely paid a portion of his debt instead of being indemnified

for the special loss incurred owing to the debtor's default in appearance and without prejudice to his power to recover the whole of the debt. The section was used as a method of procuring payment of a debt by a threat of imprisonment without the necessity of proving means, but that is contrary to the intention of the Legislature. It is clear from the certified copy of the minute of the order of November 17, 1906, that the fine was ordered to be devoted to the reduction of the judgment debt, and it is impossible to support the order as an indemnification of the plaintiff.

The Hon. Reginald Coventry, for the respondents the county court judge and the registrar. The entry in the registrar's book is not the order of the Court, but is merely a note of the proceedings: *Harris* v. *Slater*. (1) The order as drawn up relates solely to the payment of the fine. The direction of the judge as to the application of the fine is to be found in his affidavit, which shews that the fine is to be applied in indemnifying the plaintiff. The judge says that he is satisfied that the plaintiff was damnified, and the amount to be applied as an indemnification is by s. 111 in his discretion. The section was passed not to enrich the Treasury, but to assist the plaintiff in recovering his debt.

COZENS-HARDY M.R. I think that this appeal must be allowed. Unquestionably it raises a point of considerable and general importance. Under the County Courts Act, 1888, by s. 111 a penalty is imposed on a person summoned as a witness who does not attend after having his expenses tendered. The county court judge is empowered to fine him a sum not exceeding 10*l*., "and the whole or any part of such fine, in the discretion of the judge, after deducting the costs, shall be applicable towards indemnifying the party injured by such refusal or neglect, and the remainder thereof shall be accounted for by the registrar to the treasurer"—in other words, it goes to the Treasury. By a subsequent rule which has statutory effect, Order xxv., r. 31 (3A), of the County Court Rules, 1903 and 1904, "a judgment summons shall be deemed to be a summons to a witness within the meaning

(1) (1888) 21 Q. B. D. 359.

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of s. 111 of the Act," so that a judgment debtor, when a summons is taken out requiring him to attend, is brought within the operation of s. 111. In the present case the defendant in the county court proceedings did not appear on the first occasion when he was summoned, and, according to the note in the book kept by the registrar, which under s. 28 is admissible as evidence in all Courts of what was done, this is what took place: "Adjourned to next Court. Defendant fined 4*l.* for non-attendance on subpœna payable 1st December, 1906. Judge ordered fine 4*l.* when recovered to be paid to plaintiff in reduction of debt." The order as drawn up is for payment into Court of 4*l.* with 6*s.* for expenses. That was paid into Court early in January, and the matter then came again before the county court judge, and from the papers before us it appears quite clear that the 4*l.* was placed to the credit of the debtor in the ledger account, and when the subsequent proceedings were taken against the judgment debtor credit was given to him for that sum of 4*l.* paid into Court, and the direction to the bailiff is simply that he is to be discharged on the payment of 5*l.* 13*s.* 9*d.*, which is the total sum arrived at after giving credit for 4*l.*

The real point of importance which arises is this: Is the power given to a county court judge to fine a defendant for not appearing at the hearing before the judge of a debtor's summons to be used as, I was going to say, a screw for exacting payment of a portion of the debt in this sense, that the judgment debtor is liable to be imprisoned for non-payment of the fine although under ordinary circumstances he is not liable to imprisonment for non-payment of the debt unless it is proved that he has the means to pay? It seems to me that such a use of this power is unauthorized by the statutes and is a practice which might lead to great abuse and great hardship. No one doubts that the judge has power to fine the man, but the question is, what is he to do with the money? He must deduct the costs, and then it is applicable towards indemnifying the party injured by the debtor's refusal or neglect to attend. Indemnifying the injured party from the consequences of such refusal or neglect does not mean applying the fine in part payment of the debt; it means indemnifying him against the actual loss he has sustained by

reason of the debtor's non-appearance, which would include, for instance, the expenses thrown away, the conduct money which was tendered on the first summons, and there might be some other loss, for example the expenses of the plaintiff himself in coming on the first occasion, which proved abortive. I do not for a moment pretend to define, even partially, the extent to which those costs might go, but indemnity means indemnity; it does not mean part payment of the debt due from the defendant to the plaintiff. In the present case there was nothing whatever before the county court judge which would have enabled him to say that 4*l.* was the proper sum to indemnify the plaintiff against the loss, and it was not so treated; and in so far as it was not so treated it ought not to affect the liability for the debt at all, which ought to be recovered by the ordinary means. The learned judges in the Divisional Court, I think, were misled by taking the view that the order of the Court was not that which, from the complete papers now before us, it is apparent it was. Therefore I do not think that we are in any serious sense differing from the view which they held, but we are differing from the conclusion at which they arrived. In my opinion this appeal must be allowed on the ground that there was no jurisdiction to make this order.

FLETCHER MOULTON L.J. I am of the same opinion.

BUCKLEY L.J. I wish to say a word upon s. 28 of the County Courts Act, 1888, which provides, reading the relevant words, that "the registrar of every Court shall cause a note of all orders and of all other proceedings of the Court to be entered in a book, and such entries in the said book, or a copy thereof," certified as there mentioned, "shall be admitted in all Courts as evidence of such entries"—that is to say, you need not produce the original book, you may produce a properly certified copy—"and of the proceeding referred to by such entry or entries, and of the regularity of such proceeding"; that is to say, the entry is not made evidence of the order itself, but a copy is evidence of the original entry and the entry or copy is evidence of the proceeding and of its regularity. I have no doubt myself that, as

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between the entry in that book and the order, it is the order which must prevail and not the entry. The entry here contains the words "Judge ordered fine 4*l.* when recovered to be paid to plaintiff in reduction of debt." The order, which is dated November 17, 1906, simply ordered that Durbridge do pay 4*l.* to the registrar of this Court, and contained no provision as to what was to be done with the 4*l.* It simply said that it was to be paid. But on the facts of this case the variance between the entry and the order seems to be of no importance, because we have the affidavit of the learned county court judge, and upon his affidavit it is clear that the order as drawn up on November 17 was not complete, because he says, in addition to ordering the fine, "I directed that the amount of the fine, when recovered, should be applied under s. 111 of the County Courts Act towards indemnifying the plaintiff and I adjourned the further hearing of the judgment summons to the 19th January, 1907." So that the order the judge made was not simply an order imposing the fine, but there was some further order for indemnifying the plaintiff. Now what was the order for indemnifying the plaintiff? I think I am entitled now to read the entry in the book, because the learned judge has told us that the fine was applied towards indemnifying the plaintiff, and it is perfectly consistent with his affidavit that the entry in the book is right. The result is that the 4*l.* was to be applied in reduction of the debt. I need not trace what the Master of the Rolls has traced. He has shewn what was done. The 4*l.* was entered in the ledger to the credit of the judgment debtor, and the subsequent proceedings of the Court were upon that footing. The order of the judge then was that the plaintiff was to be indemnified and that he was to have the 4*l.* towards the payment of the debt. That being so, Order xxv., r. 31 (3A), provides that "a judgment summons shall be deemed to be a summons to a witness within the meaning of s. 111 of the Act," and it is quite plain that s. 111 applies. What s. 111 does is to give authority to the judge to fine a witness who does not attend, and the relevant words are "the whole or any part of such fine, in the discretion of the judge, after deducting the costs, shall be applicable towards indemnifying the party injured by such refusal or neglect." I

cannot find in those words anything authorizing the judge to apply the fine towards the payment of the debt. It does not follow at all (for reasons which I will state presently) that the judgment creditor has lost anything by the non-appearance of the debtor; he may have lost something in respect of his own expenses in coming on that day, the costs of the day, and so on, or something not covered by the words "after deducting the costs"; and in respect of all those the judge can indemnify. But suppose on a subsequent day the debtor attends and is examined as to his means, and it turns out that he has means, and he pays the debt, what has the judgment creditor lost? He has lost only the interest upon the money from the time of the first hearing till the time of the second hearing. Put the illustration the other way. Suppose the debtor attends on a subsequent day and proves that he has no means whatever, the plaintiff has lost nothing so far as the debt is concerned by the debtor's non-attendance on the first day. It seems to me impossible that the judge at the hearing when he fines the man should by way of prophecy say "By reason of the judgment debtor not attending on this day the man has lost 4*l.*, part of his debt." That is plainly not within the section. I think that this is a use of this power which, however justifiable it may be in a sense as a means of procuring payment by people who can pay, is not a legitimate use of the power. It is a power of fining the person who has refused or neglected to attend and of indemnifying the party injured by such refusal or neglect. I do not think that there is any power to use the fine in part payment of the debt. Therefore I think that this appeal succeeds.

Appeal allowed.

Solicitor: *Treasury Solicitor.*

H. B. H.

K. B. D. 1908 *June* 2. C. A. 1909 *Jan.* 29, 30; *Feb.* 1.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

RHONDDA VALLEY BREWERIES COMPANY, APPELLANTS *v.* PONTYPRIDD UNION ASSESSMENT COMMITTEE, RESPONDENTS.

Poor Rate—Valuation List—Supplemental Lists—Notice of Objection—Application to respite Appeal—Waiver of Condition Precedent to Appeal—Union Assessment Committee Amendment Act, 1864 (27 & 28 *Vict. c.* 39), *s.* 1.

Sect. 1 of the Union Assessment Committee Amendment Act, 1864, enacts that no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list unless he shall have given to the assessment committee notice of objection against the list and shall have failed to obtain such relief as he deems just.

If a person has given notice of objection against the valuation list and has failed to obtain relief, the fact that a supplemental valuation list, not containing his hereditament, has been approved by the assessment committee after the notice of objection was given does not render it necessary for him to give a fresh notice of objection before appealing to quarter sessions; and, if he does not appeal against the rate in force at the time the notice of objection was given, he is entitled to appeal, without further notice of objection, against a subsequent rate made in conformity with the same valuation list, provided that the appeal is to the next practicable quarter sessions after the decision of the assessment committee.

Reg. v. *Great Western Ry. Co.*, (1869) L. R. 4 Q. B. 323, and *Reg.* v. *Justices of Denbighshire*, (1885) 15 Q. B. D. 451, discussed.

Per Farwell and Kennedy L.JJ.: A respondent to a rating appeal, who applies for and obtains a respite of the appeal, does not by so doing waive an objection to the validity of the notice of objection.

SPECIAL CASE stated by quarter sessions for the county of Glamorgan.

At the adjourned general quarter sessions of the peace for the county of Glamorgan held on November 5, 1907, an appeal by the Rhondda Valley Breweries Company, Limited (hereinafter called the appellants (1)), against a rate made for the relief of the poor of the parish of Ystradyfodwg on April 15, 1907, came on for hearing.

(1) The expressions "appellants" and "respondents" are throughout this report used with reference to the position of the parties at quarter sessions.

The assessment committee (hereinafter called the respondents), when the appeal was called on for hearing, took a preliminary objection thereto upon the ground that the appellants, not having complied with the provisions of the Union Assessment Committee Amendment Act, 1864, s. 1 (1), were not empowered to appeal.

The Court of quarter sessions decided that the preliminary objection was bad in law and overruled the same, but consented to state this special case for the opinion of the King's Bench Division of the High Court of Justice.

In so far as the preliminary objection was concerned the following facts were proved or admitted :—

On May 16, 1900, a valuation list for the parish of Ystradyfodwg was approved by the respondents. The valuation list contained the appellants' hereditament known as the Treherbert Brewery, which was therein rated at 900*l.* gross and 800*l.* rateable. Supplemental valuation lists for the said parish were approved by the appellants on the following dates, namely, October 10, 1900, April 10, 1901, December 4, 1901, April 23, 1902, November 19, 1902, April 22, 1903, October 14, 1903, April 13, 1904, October 12, 1904, March 29, 1905, October 11, 1905, April 25, 1906, October 10, 1906, and April 10, 1907.

The appellants' hereditament was specifically referred to in the

(1) Union Assessment Committee Amendment Act, 1864 (27 & 28 Vict. c. 39), s. 1: "Before any appeal shall be heard by any special or quarter sessions against a poor rate made for any parish contained in any union to which the Union Assessment Committee Act, 1862, applies, the appellant shall give twenty-one days' notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal, and the grounds thereof, to the assessment committee of such union: Provided, that after the first day of August next no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just; and which objection, after notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear, with full power to call for and amend such list, although the same has been approved of, and no subsequent list has been transmitted to them, and if they amend the same shall give notice of such amendment to the overseers, who shall thereupon alter their then current rate accordingly."

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supplemental valuation list approved on December 4, 1901, and was therein rated at 1350*l.* gross and 900*l.* rateable. The said hereditament was not specifically referred to in any of the other supplemental lists.

The respondents contended that the valuation list of the said parish consisted of the original list of May 16, 1900, as supplemented from time to time by the above-mentioned supplemental valuation lists.

On November 1, 1906, a rate was allowed by the justices in accordance with the valuation list then in force in the parish. On November 4, 1906, notice of the rate being allowed was duly published. The only notice of objection to the valuation list given by the appellants to the respondents was dated November 10, 1906. On November 30, 1906, the appellants appeared before the respondents in support of their above-mentioned objection, upon which the respondents gave their decision on May 22, 1907, when they refused to give the appellants any relief and confirmed the above-mentioned assessment of 1350*l.* gross and 900*l.* rateable.

No appeal was entered by the appellants against the rate made on November 1, 1906.

On April 15, 1907, a rate was made in accordance with the valuation list in force in the parish. The appellants on June 8, 1907, gave notice of appeal against that rate. The appeal was entered at quarter sessions held on July 2, 1907, and on the application of the respondents was by consent then respited to the next quarter sessions to be held in October, 1907, which sessions were adjourned to November 5, 1907.

When the appeal came on for hearing on November 5, 1907, it was contended by the respondents that, in respect of the rate against which the appellants were appealing, they had not given to the respondents notice of objection to the valuation list in accordance with which such rate had been made and had not failed to obtain relief in the matter, and that, therefore, the appellants were not empowered to appeal.

It was contended by the appellants that the giving of the notice of objection dated November 10, 1906, was a sufficient compliance with s. 1 of the Union Assessment Committee Amendment

Act, 1864, and, therefore, that they were entitled to appeal against the rate made on April 15, 1907; that it was not necessary for them to give any notice of objection to the supplemental valuation list approved on April 10, 1907, because it did not contain any reference to the hereditament the subject of the appeal; and that it was not now open to the respondents to take a preliminary objection to the hearing of the appeal, because they had applied for, and obtained, a respite of the appeal at the quarter sessions held in July, 1907.

The quarter sessions held that the appellants had duly taken objection to the list on which the rate of April 15, 1907, had been made, and that as the respondents had not given their decision on that objection till May 22, 1907, the appellants had appealed to the first possible quarter sessions, and, therefore, that the contention of the respondents was incorrect, and the preliminary objection was accordingly overruled, subject to this case.

The question for the opinion of the Court was whether the decision of the quarter sessions overruling the preliminary objection was right in law.

Abel Thomas, K.C., and *John Sankey*, for the respondents. The appellants were not in a position to appeal against the rate of April 15, 1907, for they had not complied with the provisions of s. 1 of the Union Assessment Committee Amendment Act, 1864. Under the proviso to that section it is a condition precedent to an appeal to sessions against a rate "made in conformity with the valuation list approved" by the assessment committee that the appellant shall have given to the committee notice of objection "against the said list" and shall have failed to obtain such relief as he deems just. By s. 12 the provisions of the Union Assessment Committee Act, 1862, are to be incorporated with the Act of 1864, and the terms used in the later Act are to be construed in like manner as in the earlier Act. Sect. 24 of the Act of 1862 provides that every valuation list approved by the committee shall, with and subject to the alterations and additions for the time being made therein, be "the valuation list" in force. It follows that "the valuation list

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approved of" by the committee, in conformity with which the rate of April 15, 1907, was made, was the list approved on May 16, 1900, coupled with all the supplemental lists, including the supplemental list made on April 10, 1907. The appellants' notice of objection was given before the making of the supplemental list of April 10, 1907, and, therefore, the condition precedent to the right of appeal has not been performed.

The appellants should, for another reason, have given a second notice of objection. They did not appeal against the rate which was in force when the notice of objection was given, but against a subsequent rate, and it was held in *Reg.* v. *Great Western Ry. Co.* (1), that if a second rate is made after the notice of objection has been given, and the appeal is against that second rate, the giving of a fresh notice of objection is a condition precedent to the right of appeal against that second rate. That case is, therefore, a decision exactly in point. It is true that *Reg.* v. *Great Western Ry. Co.* (1) has sometimes been questioned, but it was approved of by this Court in *Rex* v. *Justices of Essex* (2), and *Reg.* v. *Justices of Derbyshire* (3) is not really inconsistent with it.

Then it is said that it is not open to the respondents to take this point because they applied at sessions to have the appeal respited. The authorities shew that a party who applies for a respite cannot afterwards object that there has been no proof of the notices of appeal or that the notices are bad: *Rex* v. *Justices of Hertfordshire* (4); *Rex* v. *Justices of West Riding of Yorkshire* (5); but there is no authority for the proposition, and it is not the law, that an application for a respite is a waiver of the non-performance of a statutory condition precedent to the right of appeal, namely, the giving of the notice of objection to the assessment committee required by s. 1 of the Act of 1864. A respite is really no more than an adjournment, and in the case of an adjournment the parties' rights are always preserved.

W. C. Ryde and *T. M. Evans*, for the appellants. The original valuation list made on May 16, 1900, together with the supplemental list of December 4, 1901, which contained the appellants'

(1) L. R. 4 Q. B. 323.
(2) [1902] 1 K. B. 180.
(3) (1871) 25 L. T. 43.
(4) (1833) 4 B. & Ad. 561.
(5) (1833) 5 B. & Ad. 667.

hereditament, is, in the circumstances of this case, "the said list" within the meaning of the proviso to s. 1 of the Act of 1864. Sects. 28 and 29 of the Act of 1862 shew that s. 24 means that the original list and the supplemental lists are to be read together as one list for purposes of valuation only and not quoad procedure on appeal. The appellants' hereditament was not referred to in the supplemental list of April, 1907, and as they had already given a notice of objection to the list which did contain their hereditament, it was not necessary, and would have been perfectly useless, for them to give further notices of objection to the various subsequent supplemental lists.

With regard to the contention that a further notice of objection should have been given because the appellants appealed against the April, 1907, rate, whereas the rate in force when the notice of objection was given was the November, 1906, rate, it was held in *Reg.* v. *Justices of Denbighshire* (1) that a person, who has once given a notice of objection to a valuation list and failed to obtain such relief as he deems just, may appeal against any subsequent rate made in conformity with that list without giving a fresh notice of objection. Therefore, as the appellants did not appeal against the rate made in November, 1906, their notice of objection was a perfectly good notice for the purpose of their appeal against the April, 1907, rate. On the other hand, in *Reg.* v. *Great Western Ry. Co.* (2) and *Rex* v. *Justices of Essex* (3) a second notice of objection was necessary because there was a second appeal, and the notice of objection was held to have been exhausted by the first appeal. These cases are on that ground distinguishable from *Reg.* v. *Justices of Denbighshire* (1), with which the present case is practically identical, and, there having been only one appeal, and that appeal having been made to the next practicable quarter sessions after the failure to obtain relief, no second notice of objection was required. [They also referred to *Reg.* v. *Justices of Wiltshire.* (4)]

In any event it is not open to the respondents, after having applied for and obtained a respite of the appeal, to contend that there has been no proper notice of objection. It is a condition

(1) 15 Q. B. D. 451.
(2) L. R. 4 Q. B. 323.
(3) [1902] 1 K. B. 180.
(4) (1879) 4 Q. B. D. 326.

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precedent to the right of appeal that there has been a notice of objection. Objections to the jurisdiction must always be taken at the earliest possible moment, and the respondents, by applying that the appeal should be entered and respited, must be taken to have admitted that on the facts the Court of quarter sessions had jurisdiction to entertain the appeal, and they could not afterwards contend at the hearing that the requisite notice of objection had not been given.

Abel Thomas, K.C., in reply.

LORD ALVERSTONE C.J. In my opinion this appeal fails on both points. I will first state why, in my opinion, it was not open to the assessment committee, after the appeal had been respited at their request from the July quarter sessions, to take the point that there no proper notice of objection to the valuation list had been given. It has been pointed out more than once that, where a person takes objection to an appeal being heard on the ground that the statutory requirements as to the giving of notices have not been complied with, the provisions of the Act are to be construed strictly, but they must not be strained in favour of the person raising the objection, for the Court always leans towards those considerations which give jurisdiction. Sect. 1 of the Act of 1864 provides that before any appeal shall be heard against a rate the person appealing shall give a certain notice to quarter sessions, and the section further provides that no person shall be empowered to appeal at all unless he has given to the assessment committee notice of objection against the valuation list and shall have failed to obtain relief. With regard to the notice of appeal, I am not aware of any enactment which says that before the appeal can be entered the notices must be proved in any particular manner; but with regard to the notice of objection to, and appearance before, the assessment committee, the Court of quarter sessions cannot entertain the appeal unless the provisions of the section have been complied with, and the appeal cannot be entered if the Court has no power to entertain it. When an application to enter an appeal is made, the respondents to the appeal are present in Court, and they know whether they intend to take the point that the proper

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notice of objection has not been given, and if they do not then take the point the appeal will be entered and heard in due course. I see no reason why the point that due notice of objection has not been given should not be waived, and in my opinion the action of the assessment committee in consenting to the entry of the appeal, and themselves applying that the appeal be respited, does amount to a waiver of the point within the principle of *Rex* v. *Justices of Hertfordshire* (1), where it was held that an application by the respondents for a respite deprived them of the right to demand at the subsequent hearing proof of the notices of appeal. It was suggested by Mr. Abel Thomas that a respite was really the same thing as an adjournment, and that on an adjournment the parties' rights are all preserved. I agree that that is so in the case of an adjournment in the ordinary sense, but for the reasons which I have stated the entry and respite of a rating appeal are not, in my opinion, at all the same thing as an adjournment. For these reasons I have come to the conclusion that it was not open to the respondents, after applying for a respite of the appeal, to raise the point that the provisions of s. 1 of the Act of 1864 as to the notice of objection had not been complied with. This really disposes of the appeal; but as the other point has been argued, I desire to say a few words upon it.

It is said that the appellants ought to have given a notice of objection to the supplemental valuation list which was approved on April 10, 1907; but I think that, when the nature of a supplemental list is considered, it will be seen that that argument cannot prevail. The present case affords an instance of the difficulty and hardship that might arise if the respondents' contention is sound, for between May, 1900, when the original list was made, and April, 1907, fourteen supplemental lists were made, in only one of which does the appellants' name appear, namely, the list approved on December 4, 1901. All these supplemental lists related to new premises or to additions to existing premises, and they had nothing to do with the rateable values of premises not therein mentioned; but if the approval of a supplemental list is to be treated as a redeposit

(1) 4 B. & Ad. 561.

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of the original list, certain things would have had to be done with regard to that original list which have not been done and which it is not suggested ought to have been done. In my opinion, although the deposit of a supplemental list makes it for certain purposes the effective list for the whole union or parish, and although it may give to an appellant certain rights of objection to items in the supplemental list—for example if he wanted to object to his own valuation on the ground that he was not properly rated having regard to the items in the supplemental list—yet I do not think that the deposit of a supplemental list can be regarded as a redeposit of the original list. I am therefore of opinion that we ought not to accede to the argument of the respondents that the making of each of these successive supplemental lists, and notably the list of April 10, 1907, imposed on the appellants the obligation to give a fresh notice of objection to the assessment committee.

Then, assuming that the notice of objection was properly given in respect of the valuation list in force in October, 1906, there remains the difficult question arising from the fact that the appeal was not against the rate in force when the notice of objection was given, but in respect of a subsequent rate. The notice of objection was given on November 10, 1906, but the assessment committee did not give their decision until May 22, 1907. A rate came into force on November 1, 1906, and another rate on April 15, 1907, and it was against that second rate that the appeal was brought, and it is contended that a fresh notice of objection ought therefore to have been given. The case of *Reg.* v. *Justices of Denbighshire* (1) is decisive of this point in the appellants' favour, for in that case a notice of objection to a valuation list was given and dealt with by the assessment committee, the appellant did not appeal against the rate then in force, but against the next subsequent rate, and Lord Coleridge C.J. and Mathew J. decided that where notice of objection is given, and the appeal is brought against the first effective rate made after the appellant has been before the assessment committee, the notice of objection is good and the appeal will lie. That is what I tried to summarize when I said

(1) 15 Q. B. D. 451.

that the result of the decisions is that if a person has failed to obtain from the assessment committee the relief to which he is entitled in respect of the matter which he is making the subject of his appeal he need not go before the committee again. But it is said that *Reg.* v. *Justices of Denbighshire* (1) is not an authority for the appellants, and that *Reg.* v. *Great Western Ry. Co.* (2), which was approved of by this Court in *Rex* v. *Justices of Essex* (3), decided that whenever there is an appeal against a second rate there must be a fresh notice of objection. Now I attempted, and I think successfully, to reconcile these decisions in *Rex* v. *Justices of Essex* (3) by pointing out that in *Reg.* v. *Great Western Ry. Co.* (2) there were two appeals against two rates, whereas in *Reg.* v. *Justices of Denbighshire* (1) there was an appeal against the second rate only, and this view is supported by the cases of *Reg.* v. *Justices of Wiltshire* (4) and *Reg.* v. *Justices of Derbyshire.* (5) If, however, the cases are conflicting, I think that on the facts of this case we are bound to follow *Reg.* v. *Justices of Denbighshire* (1); but I still think that they can be reconciled on the grounds I suggested in *Rex* v. *Justices of Essex* (3), and that in a case where there has been no appeal against the rate in force when the notice of objection is given, and there is an appeal to the first effective rate after the decision of the assessment committee failing to give relief, it is not a condition precedent to the appeal that a fresh notice of objection shall be given. I think, therefore, on both grounds that the appeal must be dismissed.

DARLING and SUTTON JJ. concurred.

Appeal dismissed.

The respondents appealed. The appeal was heard on January 29 and 30, and February 1, 1909.

Abel Thomas, K.C., and *Clive Lawrence*, for the respondents.

W. C. Ryde and *T. M. Evans*, for the appellants.

[The arguments were the same as in the Court below, and in

(1) 15 Q. B. D. 451.
(2) L. R. 4 Q. B. 323.
(3) [1902] 1 K. B. 180.
(4) 4 Q. B. D. 326.
(5) 25 L. T. 43.

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addition to the cases there cited the following were referred to: *Reg.* v. *Justices of Lancashire* (1); *Reg.* v. *London & North Western Ry. Co.* (2); *Rex* v. *Justices of Staffordshire.* (3)]

VAUGHAN WILLIAMS L.J. In my opinion the judgment of the Divisional Court in this case should be affirmed. The appeal comes before this Court on a special case stated by the justices of the peace for the county of Glamorgan. It appears that at the quarter sessions for that county held on November 5, 1907, an appeal by the Rhondda Valley Breweries Company against a poor rate made on April 15, 1907, came on for hearing. The respondents to that appeal, the assessment committee of the Pontypridd Union, took a preliminary objection to the hearing of the appeal on the ground that the appellants had not complied with the provisions of the Union Assessment Committee Amendment Act, 1864. The justices overruled that preliminary objection, but stated a case for the opinion of the Divisional Court, and that Court affirmed the decision of the justices, and hence the appeal to this Court.

The question in dispute is whether, in the circumstances of this case, the giving of a fresh notice of objection to the valuation list for the parish of Ystradyfodwg was a condition precedent to the appeal to quarter sessions. In order to decide that question it is necessary to construe s. 1 of the Union Assessment Committee Amendment Act, 1864, and particularly the words in the proviso to that section. That Act amended the Union Assessment Committee Act, 1862, and the two Acts are closely connected, because s. 12 of the Act of 1864 says that the terms used in that Act "shall be construed in like manner" as in the Act of 1862. [The Lord Justice read s. 1 of the Act of 1864 and stated the facts as set out in the special case, and continued:—] The first thing to notice in the proviso to s. 1 is that the notice of objection may apparently be given at any time, whereas under the Act of 1862 the notice of objection had to be given within a limited time. Now, the Act of 1864 being an amendment of the Act of 1862, it is convenient that we should consider what the

(1) (1874) 43 L. J. (M.C.) 116. (2) (1876) 46 L. J. (M.C.) 102.
(3) (1806) 7 East, 549.

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amendment in the Act of 1864 was. Under ss. 18 and 19 of the Act of 1862 it was optional with the person aggrieved whether he would apply to the assessment committee or not, and if he did not choose to go to the assessment committee he might appeal direct to sessions. Under the Act of 1864 the proviso in s. 1 makes the giving notice of objection to the assessment committee and failing to obtain relief a condition precedent to the appeal to sessions.

The case of *Reg.* v. *Bedminster Union* (1) shews that the sessions to which the appeal lies is the next after the assessment committee have given their decision; and that was decided also in the case of *Reg.* v. *Biggleswade Union*. (2) I mention those cases for this reason, that they decide conclusively that a person cannot be said, within the meaning of s. 1 of the Act of 1864, to have failed to obtain relief until the assessment committee have given their decision upon the objection which has been taken. In *Reg.* v. *Bedminster Union* (1) the assessment committee (there being a case pending in the Queen's Bench which raised the identical question) were of opinion that they ought not to deal with the objection until the Court of Queen's Bench had decided the very same point. I should not have thought there could be any doubt about it, and Blackburn J. in his judgment in that case decided in the plainest possible manner that that was so. Applying that to this case, inasmuch as the assessment committee did not give their decision until May 22, 1907, that was the first opportunity upon which the appellants were able to say that they had given notice of their objection to the assessment committee and had failed to obtain relief. They had not, according to *Reg.* v. *Bedminster Union* (1), failed to obtain relief until the committee had given their decision. I do not know whether that decision need necessarily be a decision upon the merits of the point or not, and I am not going to decide that matter. In this particular case the only decision given at all by the assessment committee was a decision on the merits of the case. *Reg.* v. *Bedminster Union* (1) is an interesting case in another respect, because Mellor J., a great authority on rating matters, said that the object of the Act of 1864 was to give,

(1) (1876) 45 L. J. (M.C.) 117. (2) (1869) 21 L. T. 494.

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instead of an expensive appeal to the quarter sessions, a summary and cheap appeal to the assessment committee by any one who was dissatisfied with the valuation list. In that particular case the appeal was, as I understand, an appeal made on the basis of the rates which were in force at the time when the notice of objection was given to the assessment committee. Here, of course, there were two different rates, and that so far makes this case a different case.

I confess that, reading these two statutes together, the one as amending the other, I should be inclined, prima facie, to read the words "poor rate made in conformity with the valuation list approved by such committee" in s. 1 of the Act of 1864 in the same sense in which "valuation list" is used in s. 24 of the Act of 1862. That section says: "Every valuation list approved by the committee, and delivered to the overseers of the parish to which the same relates, shall, with and subject to the alterations and additions for the time being made therein or thereto by any supplemental valuation lists so approved and delivered, be the valuation list in force in such parish, except in the case of any parish, as is hereinafter referred to, in which the poor rate, or assessment for the poor rate, is made under the authority of a local Act, until a new valuation list in substitution for the same be approved and delivered in like manner." Of course, if one did read the words in s. 1 of the Act of 1864 in the sense of s. 24 of the Act of 1862, the result upon the facts here would be that, as there have been supplemental valuation lists since the notice of objection was given, there would be, each time a new supplemental list was made, one valuation list in force, which would be the "original" valuation list, as I may call it, subject to the intervening supplemental lists; and as in this case there have been fourteen supplemental lists, it must, of course, necessarily follow that the notice of objection which was given in this case in November, 1906, would have been an objection to a wholly different list from the list in that sense, which would be the original list, coupled with all the subsequent supplemental lists. Without going at length into the former law, it is important to recollect that prior to the Act of 1862 the overseers had to make periodic valuations, which, under the

Statute of Elizabeth, were made once a month, and they came to be made either once a half-year or once a year, and there was no difficulty then, because in each year, or each periodic period, there was a new rate made. The object of the Act of 1862 really was in the new unions of parishes to make the valuation list in force, not for one of these periods, but until a new original list should be substituted, "subject to the alterations and additions for the time being made therein or thereto by any supplemental valuation lists so approved and delivered," that is, approved and delivered to the overseers of the particular parishes.

Prima facie, therefore, I should have thought that s. 24 of the Act of 1862, if it is held to govern the application of s. 1 of the Act of 1864, would have necessitated, as Mr. Abel Thomas contended it did necessitate, a new notice of objection after the making of every fresh supplemental list. That certainly would have produced a very inconvenient state of things, and we have to consider whether we are bound to hold that s. 24 governs the meaning of the words "in conformity with the valuation list approved of by such committee" in s. 1 of the Act of 1864. Now, bearing in mind that the Act of 1864 was intended to give an easy and cheap mode of appeal, I think that we may fairly read these words in the way in which I am going to state them. Sect. 1 deals with the case of any individual ratepayer who desires to appeal to sessions against a rate which he considers oppressive or wrong, and as a condition of appealing he is obliged to give a notice of objection to the assessment committee in order that the matter may be speedily and cheaply settled by discussion with the committee, and it would, I think, be putting a very heavy burden upon the objector, who, having failed to obtain relief, still desired to appeal, if we were obliged to hold that, when the appeal came on, his notice of objection had ceased to be a valid notice of objection by reason of the intervention of a number of supplemental valuation lists, which, however, did not affect the hereditament in respect of which the objector had given his notice of objection to the assessment committee. Of course, if the assessment to which objection was taken had been altered, as it might be, either by increase or by reduction, in the supplemental list, the original notice of objection might well be

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said to be one which did not comply with the provisions of s. 1 of the Act of 1864, because the appeal to quarter sessions in that case would be in respect of a matter which had never in any way been dealt with by the assessment committee. But in the present case it is common ground that as far as the appellants' hereditament is concerned the assessment is exactly the same as it was at the time when the notice of objection was given, which objection it is now sought to be said does not comply with the section, because there have been subsequent supplemental valuation lists, although those supplemental lists in no way affected the hereditament in question. It seems to me that the view which I am expressing is a reasonable view to take of the subject-matter which had to be dealt with by this legislation, and it is therefore only necessary to see whether, notwithstanding the words of s. 24 of the Act of 1862, s. 1 of the Act of 1864 cannot be read as enacting that which, in my opinion, not only is a reasonable but the most reasonable way of dealing with the true object of the Legislature, which was simply this, that for economical reasons it was considered desirable that, before the expense of going to quarter sessions is incurred, there should be what I may call a conference between the objector and the assessment committee in respect of the assessment which is the basis of the appeal to quarter sessions. The section says "No person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list." I think we may reasonably read the word "list" in that sentence as meaning any approved list which contains the assessment objected to by the objector, and that is the way in which I read these words. I think that in these circumstances it is true to say in this case that the objector has failed to obtain relief in respect of the list that is material to this case. It is quite true there has been an intervening rate which was actually paid without objection by the appellants, but it does not seem to me that that makes any difference, provided always that the assessment which is the basis of the appeal is an assessment which really has been subjected to that preliminary discussion

by the assessment committee which is the very object of the Act of 1864.

That I understand to be the view of the Divisional Court. The Lord Chief Justice went through all the cases and he reconciled, or tried to reconcile, them. I am not sure that he has succeeded in doing so. One may distinguish the cases as groups coming under two decisions. One of those decisions is *Reg.* v. *Great Western Ry. Co.* (1), and the other is *Reg.* v. *Justices of Denbighshire.* (2) Neither of these cases is binding on us in this Court, and we can therefore give our decision without following exactly either one of them. The Divisional Court was in a different position, because when they came to deal with the present case there had been a decision in the case of *Rex* v. *Justices of Essex* (3), and that case had followed the decision of the Queen's Bench, in *Reg.* v. *Great Western Ry. Co.* (1) and had not followed the decision of the Queen's Bench Division in *Reg.* v. *Justices of Denbighshire.* (2) That case was not overruled, but it was what is called distinguished. The case of *Reg.* v. *Great Western Ry. Co.* (1) had been the subject of a good many comments, particularly some comments by Lord Coleridge C.J. and Mathew J. in *Reg.* v. *Justices of Denbighshire.* (2) Under those circumstances it was necessary for the King's Bench Division in *Rex* v. *Justices of Essex* (3) to deal with the difference of opinion, and they dealt with it by following *Reg.* v. *Great Western Ry. Co.* (1) It is said that the decision of the Divisional Court in the present case has departed from *Rex* v. *Justices of Essex* (3) and has gone back again to *Reg.* v. *Justices of Denbighshire.* (2) All I desire to say is that in words it does not do so; and in intention it is plain from the judgment of Lord Alverstone C.J., which was concurred in by Darling and Sutton JJ., that they at all events thought that, when properly examined, the two cases *Reg.* v. *Great Western Ry. Co.* (1) and *Reg.* v. *Denbighshire Justices* (2) were reconcilable. Although it was necessary for them to deal with the cases, I do not think it is necessary for us to do so; but I am far from saying that the two cases may not be reconciled, especially

(1) L. R. 4 Q. B. 323. (2) 15 Q. B. D. 451.
(3) [1902] 1 K. B. 180.

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since Lord Alverstone, in a very clear and learned judgment, is still of opinion that they may be reconciled.

The decision which, if right, is undoubtedly conclusive of this case is *Reg.* v. *Justices of Denbighshire* (1), and with regard to that case, which the Lord Chief Justice followed, and the principles of which I am now intending to follow myself, he said: "Lord Coleridge C.J. and Mathew J. decided that where notice of objection is given, and the appeal is brought against the first effective rate after the appellant has been before the assessment committee and has failed to obtain the relief which he thought just, the notice of objection is good and the appeal will lie. That was what I tried to summarize when I said that I thought the result of the decisions was that if a person has been before the assessment committee and has failed to obtain the relief to which he is entitled in respect of the matter which he is making the subject of his appeal he need not go before the committee again." I think that covers this case, and that there was no necessity for the appellants, as a condition of appealing to quarter sessions, to give a fresh notice of objection to the assessment committee.

There is one fact which is relied upon as putting this case outside the decisions on which I am basing my judgment, and that is that in the interval between the giving of the notice of objection and the notice of appeal there was a rate in force in respect of which the appellants did not appeal. But to my mind that fact really makes no difference, if it is remembered that after they had given their original notice of objection it was impossible, on the undisputed authority of the cases, for them to go to quarter sessions until the assessment committee had dealt with the objection and either given the relief or refused it, and the decision of the assessment committee was not given till May 22, 1907.

It has also been contended that, inasmuch as the respondents to the appeal to quarter sessions applied for a respite of the appeal from the July to the October sessions, that is a waiver by them of any objection based upon the alleged non-compliance with the requirements of s. 1 of the Act of 1864 as to notice of

(1) 15 Q. B. D. 451.

objection. As, however, the basis of my judgment is that the section had been complied with, there was nothing to waive, and it is not necessary to decide whether there could be or has been a waiver of the objection. It has been said that when an Act of Parliament has provided that the performance of a particular duty is a condition precedent to an appeal it is not within the powers of the parties to waive the performance of that statutory condition, and it is also said that the Lord Chief Justice drew a distinction between a respite and an adjournment. As it is not necessary to decide the question of waiver, I prefer not to express any opinion upon it.

For the reasons which I have given I am of opinion that this appeal must be dismissed.

FARWELL L.J. The Divisional Court decided against the assessment committee on two grounds—(1.) that they had waived their objection by consenting to an adjournment; and (2.), if not, that their objection was not well founded. I am unable to agree with the first ground. A mere adjournment by consent, without more, leaves the parties at the adjourned hearing in the same position as that in which they stood at the original hearing; but it would be otherwise if the adjournment, by reason of opposition or for any other reason, necessitated the making of an order by the Court which could not be made unless some preliminary objection to jurisdiction was waived, as was the case in *Rex* v. *Justices of Hertfordshire* (1), where an order for costs was asked for and obtained by the persons entitled to object to the jurisdiction of the Court to deal with the case at all. Moreover, the proviso takes away the right of appeal unless and until the committee has reconsidered the assessment, and I doubt very much if it is open to the parties to waive a statutory condition precedent which is for the benefit of the public, by saving public time at quarter sessions, and of all the ratepayers, by saving their money.

On the second ground, however, I agree with the conclusion at which the Divisional Court has arrived for the following reasons. The appeal, and the only appeal, open to a ratepayer

(1) 4 B. & Ad. 561.

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is to the next practicable quarter sessions after the rate, against the rate. But the rate is itself founded on the assessment of property, and such assessment appears in the valuation list, and the effect of a successful appeal against a rate is that the relevant assessment is altered in the valuation list. Now the valuation list is made out at irregular intervals extending over several years, and is from time to time altered by amendments and additions as the assessment committee think fit, until it is found expedient to settle a new list; and until this is done the original list, with and subject to the alterations and additions, is the valuation list in force in the parish, and the rates are made yearly or half-yearly, as the case may be, on the list as last altered and amended. This valuation list is the creation of the Act of 1862, and in 1864 the Legislature saw fit to limit the right of appeal against a rate to quarter sessions by s. 1 of the Union Assessment Committee Amendment Act, 1864. The rate being founded on an assessment of premises as entered in the valuation list, and such assessment having possibly been made some years prior to the rate objected to, it was obviously desirable in the interests of all parties that the assessment committee should have an opportunity of reconsidering the assessment before the expense of an appeal was incurred, and s. 1 was accordingly enacted. Now, if s. 24 of the Act of 1862 is to be regarded as a definition section for all purposes of both Acts, the ratepayer would, in my opinion, fail. But I do not think that this is the true view. Sect. 24 is not in terms a definition; it is dealing with the rates of all ratepayers, and has especial reference to s. 28; but s. 1 of the Amendment Act is dealing with a particular ratepayer who is aggrieved by an assessment entered either in the original or in some amended list, and who is not for the purposes of his appeal concerned with other amendments or additions. I read the words "approved by the committee," &c., by the light of the words immediately following, "unless he shall have given notice of objection to such list," and so read it would run "approved by the committee so as to give rise to the objection of any objector unless he shall have given notice of such objection," &c. It is to my mind immaterial that the rate which has called forth the appeal is in 1906; it is founded on

an assessment approved and appearing in a valuation list in 1901 and unaltered since; the only matter that the ratepayer is concerned with reconsidering is that assessment and that list, and this he applied for in November, 1906, and obtained on May 22, 1907. No appeal to quarter sessions against the rate of November, 1906, which caused the application, has been made; but the rate of April, 1907, although made on the list in force within s. 24 of the Act of 1862, is yet, so far as the ratepayer is concerned, based on the assessment of 1901, which was the foundation of the rate of November, 1906, and has already been reconsidered by the assessment committee. I am therefore of opinion that the Act does not require the ratepayer to go back to the committee again. It would be otherwise if he had unsuccessfully appealed against the November, 1906, rate; such appeal would have exhausted the reconsideration given by the committee, and any further appeal would have had to be preceded by a further reconsideration, as was held in the case of *Reg.* v. *Great Western Ry. Co.* (1)

Further, I think that the right to call on the committee to reconsider is not exhausted by one exercise of it; the proviso says "after notice given at any time"; a ratepayer can appeal against every fresh rate, and the right to call for reconsideration is a preliminary incident to each appeal. It cannot have been intended to leave a ratepayer fixed with a rate to which he objected unsuccessfully four or five years ago until the committee think fit to make a new list, however much the rateable value of his property may have been altered in the meantime. I see nothing, however, to prevent a ratepayer, if he thinks that a case for reconsideration has arisen since his assessment was last considered, from applying for a reconsideration a second time, although such second application is not a condition precedent to his appeal. The construction that I have put upon the Acts appears to me to be in accordance with the decided cases, and I am of opinion that this appeal fails and should be dismissed with costs.

KENNEDY L.J. This is an appeal against a judgment of the Divisional Court which decided two points, and both of them in

(1) L. R. 4 Q. B. 323.

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favour of the original appellants. The one was a point of waiver with regard to a preliminary duty; the other was as to the validity of the notice of objection.

With regard to the question of waiver, I only desire to say that I do not agree with the decision in the Court below. The preliminary step in this case is, as Farwell L.J. has said, not a mere formality between litigants in an ordinary litigation, but a statutory proceeding which is required in the interests of the public, and for the saving of the expense of the ratepaying community of the district; and it does not seem to me that the effect of asking for a respite or an adjournment is to waive any objection to compliance with a preliminary step which goes to the foundation of the case.

The other point raised is unquestionably a point of importance, and I have derived much assistance from the arguments of the learned counsel on both sides. I will first deal with the contention that the appeal to quarter sessions necessarily failed because it was an appeal, not against the rate of November, 1906, but against the rate which was made in April, 1907. That point, I think, may be very shortly dismissed. It seems to me that, provided the appeal is made to the first practicable sessions after the decision of the committee, it is immaterial whether the appeal is against the rate then current or an earlier rate, unless there has already been an appeal against the earlier rate, in which case it may be that there must be the statutory foundation for the second appeal in the form of a fresh notice of objection to the assessment committee. But in this case there was, upon the facts, a single appeal to the first practicable sessions after there had been the failure to obtain the relief from the assessment committee, and in taking as the subject-matter of appeal the rate then current, instead of the earlier rate, it appears to me that the only result is that the appellants have to pay the earlier rate, against which they have not appealed.

The next question seems to me to be the more difficult one. It is objected that in this case there was made on April 10, 1907, a new supplemental valuation list, and it is said on behalf of the respondents that the appellants had no locus standi on their appeal to quarter sessions unless, there having been this new

supplemental valuation list, they had given notice of objection to that new valuation list, because a new notice of objection was rendered necessary by the fact of the making of that new list. Now it seems to me that where, as here, the ground of appeal is an appeal relating to the assessment of the appellants' own property, and not an appeal which as ratepayers I presume they would have been in law entitled to make, if they thought there was ground for it, against the assessment of another person's property, it cannot be necessary that the appellants should make a fresh objection in a case where the new or supplemental valuation list does not concern the subject-matter of their appeal, because it does not affect the assessment of their property; and it is against the assessment of their own property that the appellants in this case are seeking to get relief. If they had been seeking to get relief in respect of alterations appearing in the new supplemental valuation list which touched the property of others, then I think it is clear that they must have given a notice of objection to that new list.

In my opinion this question mainly depends, as has been already stated, upon the construction to be put upon the language of the proviso of s. 1 of the Act of 1864. I am not going to read that proviso again, and I only desire to say that it seems to me that, when the section says "no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list approved by such committee," it must, as a matter of common sense, I might almost say of necessity, mean "in conformity with the valuation list containing the assessment against which the particular ratepayer intends to appeal," because otherwise the words "made in conformity with the valuation list" would be irrelevant as regards that person. Of course, if after notice of objection has been given, the property in question is dealt with in a new supplemental list, and if the objector still desires to appeal, he must give a fresh notice of objection to that new supplemental list in order that the assessment committee may have an opportunity of further considering, and, if necessary, of amending, the assessment in that new supplemental list. But if, as in the present case, that against which the objector is going to appeal is something

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contained in an earlier valuation list, whether in the list as originally made or in an earlier supplemental list against which notice of objection has been given, the objector is not, in my opinion, required to give a fresh notice of objection to the assessment committee with regard to a subsequent supplemental list, which is wholly irrelevant to the matter of the intended appeal. To do so would be, in the language of Mathew J. in *Reg.* v. *Justices of Denbighshire* (1), the idlest form imaginable, since the new supplemental list could in no sense have any bearing or effect upon that which was the basis and subject of the objector's action. Therefore it seems to me in regard to the words "made in conformity with the valuation list," that the section must mean the valuation list which affects the property in respect of which the appellant seeks to appeal. Then the section says "unless he shall have given to such committee notice of objection against the said list"—namely, the list which contains that which is the matter of the complaint—"and shall have failed to obtain such relief in the matter as he deems just." I suggested in the course of the argument and I still think that it is true to say, without claiming for it the merit of a definition, that for the purposes of the proviso to s. 1 the valuation list there described means what I may call the original valuation list, if the objection is founded on what is contained in that, or the original list plus any supplemental list, if the objection is founded on the effect of the assessment in both together. In this case the supplemental list of April, 1907, did not affect the appellants' property. The notice of objection had been given against the list which did contain their property, and as soon as practicable after the decision of the assessment committee on that objection the appellants appealed to quarter sessions, and I do not think that there was any failure to give a notice of objection in accordance with the proviso.

I have carefully considered the four cases which were chiefly referred to on this point, and speaking only for myself, I entirely agree with Lord Alverstone C.J. that there is no real conflict between them. The result of the cases was, I thought, neatly expressed by Mr. Ryde when he spoke of it as being a

(1) 15 Q. B. D. 451, at p. 456.

case of one assessment, one objection, one appeal, and that is substantially true. So long as the appellant has not appealed against a prior rate there is no necessity to give a fresh notice of objection, and if that is borne in mind it can, I venture to think, be shewn that the cases are reconcilable. In *Reg.* v. *Great Western Ry. Co.* (1) there were two appeals, as I understand the facts, against two successive rates and only one notice of objection. It was held, therefore, that there ought to have been a second notice of objection. In *Reg.* v. *Justices of Wiltshire* (2) it was held that it was not necessary to object twice in respect of the same rate, or, in other words, where it is not a second rate which is in question a second notice of objection need not be given to the assessment committee. Then in *Reg.* v. *Justices of Denbighshire* (3), which to my mind is very much in point here (indeed the only suggested difference that I understood Mr. Abel Thomas to suggest is the absence of any reference in that case to the presence of what I may call an intervening supplemental list), it was held, as we are holding here, that there was no necessity to give a fresh notice of objection, there being only one appeal against a rate, and that having been preceded by an objection against the list then in force and there having been a failure to obtain relief. Lastly, there is the case of *Rex* v. *Justices of Essex* (4), in which Lord Alverstone C.J. presided over the Court and gave judgment. That, again, was a case of a second appeal against another rate, and if there is a second appeal, then, whether there has been an intervening supplemental valuation list or not, I think the appellant is bound to give a fresh notice of objection to form the foundation of a new appeal. I think, therefore, that the cases are distinguishable inter se, and that the one which most resembles the present case is *Reg.* v. *Justices of Denbighshire.* (5) Substantially I agree with the reasoning of the judgment delivered by Lord Coleridge C.J. in that case, though possibly some of his observations must not be read too widely, but as applying only to the particular facts of that case.

(1) L. R. 4 Q. B. 323.
(2) 4 Q. B. D. 326.
(3) 15 Q. B. D. 451.
(4) [1902] 1 K. B. 180.
(5) 15 Q. B. D. 451.

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I do not, however, think that it would have made any difference to the decision if there had been in that case an intervening supplemental valuation list not dealing with the particular hereditament then in question on the appeal.

In my opinion the appeal fails, the judgment of the Divisional Court being right on this part of the case.

VAUGHAN WILLIAMS L.J. I omitted to say what I think is material, that the notice of objection which was given to the assessment committee was an "objection to the last deposited valuation list." I think that means the last deposited valuation list affecting the premises hereinafter mentioned. If it had said so, no exception could have been taken to it.

Appeal dismissed.

Solicitors for appellants: *Blundell, Gordon & Co.*

Solicitors for respondents: *Wrentmore & Son, for Sprickett & Sons, Pontypridd.*

F. O. R.

THE ATTORNEY-GENERAL *v.* THE ANGLO-ARGENTINE TRAMWAYS COMPANY, LIMITED.

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Feb. 16.

Revenue—Stamp—Capital of Company—"Increase of Registered Capital"—Resolution of Company authorizing Directors to increase Capital—Subsequent Issue of Shares by Directors—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 112.

By s. 112 of the Stamp Act, 1891, "a statement of the amount which is to form the nominal share capital of any company to be registered with limited liability shall be delivered to the Registrar of Joint Stock Companies . . . . and a statement of the amount of any increase of registered capital of any company now registered or to be registered with limited liability shall be delivered to the said registrar, and every such statement shall be charged with an ad valorem stamp duty of 2*s.* (now 5*s.*) for every 100*l.* . . . . of the amount of such capital or increase of capital, as the case may be."

The articles of association of a company gave the directors power, with the sanction of a general meeting, to increase the capital of the company by the creation and issue of new shares. A resolution was passed at a general meeting of the company that "the directors be, and they are hereby, authorized to increase the capital of the company by an amount not exceeding the nominal sum of 5,000,000*l.*, by the creation and issue from time to time of new ordinary shares of 5*l.* each." The directors thereupon passed a resolution that "the capital of the company be increased by 200,000*l.* by the creation and issue of 40,000 new ordinary shares of 5*l.* each"; and on a subsequent occasion they passed another resolution in similar language increasing the capital by 2,800,000*l.* The Crown claimed stamp duty under s. 112 of the Stamp Act, 1891, in respect of an increase of capital of 5,000,000*l.* The defendants contended that they were only bound to pay stamp duty in respect of an increase of capital of 3,000,000*l.*, the amount of capital actually created and issued by the directors of the company:—

Held, that "registered capital" in s. 112 of the Stamp Act, 1891, meant authorized capital, i.e., the maximum amount of capital which the company had power to issue; and that, by the resolution of the company, there had been an increase of that capital by 5,000,000*l.*, upon which sum ad valorem stamp duty was payable.

Information filed by the Attorney-General claiming from the defendants as a debt due to His Majesty a sum of 12,500*l.*, together with interest thereon, the parties concurring in stating the questions of law arising therein in the following case for the opinion of the Court.

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The defendants were an English company incorporated by registration, under the laws relating to limited liability, in the year 1887, with a capital of 800,035*l.* divided into 160,007 shares of 5*l.* each. By the articles of association the regulations in table A in Sched. I. to the Companies Act, 1862, were excluded. Article 42 was in the following terms:—"The board may with the sanction of a general meeting increase the capital by the creation of new shares, to be issued either as ordinary shares or wholly or in part with any preference, guarantee, priority, or other special advantages over the other then created or existing shares of the company as by such general meeting may be thought expedient." Article 118 was in the following terms:—"The general conduct and management of the business of the company shall be carried on by the board under such regulations (not inconsistent with the regulations of the company for the time being in force) as they shall in their discretion think fit to establish, and they may from time to time determine their quorum and procedure, and may appoint and fix the duties and salaries of all officers and servants of the company, and may give to any of them any remuneration which they may think fit in proportion to or depending on the profits made or the dividends declared by the company, and may exercise all such powers of the company, and do and authorize or allow all such acts and things, as are not by the statute or by the regulations of the company for the time being in force declared to be exercisable only, or capable of being done or authorized only, by the company in general meeting; subject nevertheless to any regulations of these articles and to such regulations (being not inconsistent with the statute or these presents) as may from time to time be prescribed by the company in general meeting; but no regulation made by the company in general meeting shall invalidate any prior act of the board which would have been valid if such regulation had not been made."

On July 26, 1907, there was passed at a duly convened general meeting of the defendant company the following resolution, being the second of those passed at that meeting:—"That for the purpose of carrying into effect the above resolution" (that is, a resolution approving a provisional agreement for acquiring an

undertaking of another company) "and of acquiring, if the directors shall deem desirable, any other tramway undertaking or undertakings in the city of Buenos Ayres or its vicinity, or any shares, stock, securities, or obligations of any company or companies carrying on any such undertaking, the directors be, and they are hereby, authorized to increase the capital of the company by an amount not exceeding the nominal sum of 5,000,000*l.*, by the creation and issue from time to time of new ordinary shares of 5*l.* each."

On August 27, 1907, there was passed at a meeting of the directors of the defendant company the following resolution:—"That in pursuance of the authority given to the directors by the second resolution passed at the extraordinary general meeting of the company held on July 26, 1907, the capital of the company be increased by 200,000*l.* by the creation and issue of 40,000 new ordinary shares of 5*l.* each, such shares to be numbered from 580,008 to 620,007 inclusive."

On August 29, 1907, a statement and notice of increase of capital to the amount of 200,000*l.* were left by a representative of the solicitors of the defendant company with the Registrar of Joint Stock Companies. The defendant company were willing to stamp this statement with, and in fact paid, the duty requisite in respect of an increase of 200,000*l.* capital, but not in respect of an increase of 5,000,000*l.* capital. By letter dated August 30, 1907, the solicitors of the defendant company gave notice to the registrar of the passing of the resolution of July 26, 1907, and also the resolution of August 27, 1907. By letter of November 11, 1907, this letter was acknowledged by the registrar, and it was intimated that in respect of the resolution of July 26, 1907, duty in respect of an increase of capital of 5,000,000*l.* was claimed. The letter of August 30, 1907, together with the print of the resolutions therein enclosed, was duly filed on the register of the defendant company by the Registrar of Joint Stock Companies.

On July 1, 1908, there was passed at a meeting of the directors of the defendant company the following resolution:—"That in pursuance of the authority given to the directors by the second resolution passed at the extraordinary general meeting of the

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company held on July 26, 1907, as varied by the second resolution passed at the extraordinary general meeting of the company held on June 30, 1908, the capital of the company be increased by 2,800,000*l.*, by the creation and issue of 300,000 third preference shares of 5*l.* each, to be numbered from 1,080,008 to 1,380,007 inclusive, and 260,000 ordinary shares of 5*l.* each, to be numbered from 620,008 to 880,007 inclusive."

On July 4, 1908, a statement of increase of capital to the amount of 2,800,000*l.* was delivered on behalf of the defendant company to the Registrar of Joint Stock Companies, and capital duty at the rate prescribed by s. 112 of the Stamp Act, 1891, as amended by s. 7 of the Finance Act, 1899 (1), namely, the sum of 7000*l.*, was then paid thereon.

It was contended on behalf of the Attorney-General—

(1.) That the resolution of July 26, 1907, was a resolution increasing the capital of the defendant company by 5,000,000*l.*;

(2.) That the resolution when filed effected an increase in or upon the registered capital of the defendant company to the extent of 5,000,000*l.*;

(3.) That upon the true construction of s. 112 of the Stamp Act, 1891, s. 12 of the Finance Act, 1896 (2), and s. 5 of the Revenue Act, 1903 (3), the effect of those sections was to tax

(1) Stamp Act, 1891 (54 & 55 Vict. c. 39), s. 112: "A statement of the amount which is to form the nominal share capital of any company to be registered with limited liability shall be delivered to the Registrar of Joint Stock Companies in England, Scotland, or Ireland, and a statement of the amount of any increase of registered capital of any company now registered or to be registered with limited liability shall be delivered to the said registrar, and every such statement shall be charged with an ad valorem stamp duty of two shillings for every one hundred pounds and any fraction of one hundred pounds over any multiple of one hundred pounds of the amount of such capital or increase of capital, as the case may be."

By the Finance Act, 1899 (62 & 63 Vict. c. 9), s. 7, five shillings is substituted for two shillings as the ad valorem stamp duty imposed by ss. 112 and 113 of the Stamp Act, 1891.

(2) Sect. 12 of the Finance Act, 1896 (59 & 60 Vict. c. 28), extends the provisions of s. 113 of the Stamp Act, 1891, to certain other corporations and companies.

(3) Revenue Act, 1903 (3 Edw. 7, c. 46), s. 5: "The statement of the amount of any increase of registered capital of any company registered under the Companies Acts, 1862 to 1900, which is required by s. 112 of the Stamp Act, 1891, to be

any capital or increased capital which a company took power to raise;

(4.) That the defendant company ought within fifteen days of the passing of the resolution of July 26, 1907, to have delivered a statement duly stamped in respect of an increase of capital of 5,000,000*l.* as required by s. 112 of the Stamp Act, 1891, s. 7 of the Finance Act, 1899, and s. 5 of the Revenue Act, 1903.

It was contended on behalf of the defendant company—

(1.) That the resolution of July 26, 1907, did not effect any increase of the registered capital of the defendant company;

(2.) That such resolution was only an authority to the directors enabling them to increase the capital of the defendant company within the prescribed limits by the creation of new shares;

(3.) That no increase of capital took place until the directors passed their resolution of August 27, 1907, and then only to the extent of the 200,000*l.* mentioned in that resolution;

(4.) That upon the true construction of s. 112 of the Stamp Act, 1891, s. 7 of the Finance Act, 1899, and s. 5 of the Revenue Act, 1903, no tax was imposed by those sections except upon capital which a company had power to issue, and that until the creation of new shares by a resolution of the board the defendant company had no power to issue any capital in excess of the amount of their original nominal capital;

(5.) That the defendant company had duly complied with the requirements of s. 112 of the Stamp Act, 1891, and s. 7 of the Finance Act, 1899, by delivering the statements and making the payments above referred to.

The question of law for the opinion of the Court was whether, upon the facts above stated, the defendants ought to have delivered to the Registrar of Joint Stock Companies a statement of the increase of capital stamped in respect of an increase of 5,000,000*l.* If the Court should be of opinion in the affirmative, judgment was to be entered for the Attorney-General for the sum claimed (after giving credit to the defendant company for the

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delivered to the Registrar of Joint Stock Companies, shall be delivered duly stamped with the duty charged thereon within fifteen days after the passing of the resolution by which the registered capital is increased . . . . "

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payments already made in respect of capital duty) together with interest; but if the Court should be of opinion in the negative, judgment was to be entered for the defendants.

Sir S. T. Evans, S.-G., and *Austen-Cartmell* (*W. Finlay* with them), for the Crown. Under s. 112 of the Stamp Act, 1891, the duty is payable on the increased capital authorized by the company to be issued, and not upon the increased capital actually issued by the directors. An "increase of registered capital" within the meaning of s. 112 means an increase of the authorized or nominal capital. The resolution of the company of July 26, 1907, authorized an increase of authorized capital to the amount of 5,000,000*l.* The directors were authorized by that resolution to issue the shares to that amount at once, if they had thought fit. In issuing the shares the directors acted ministerially, and it was not their act which increased the capital of the company. By article 118 of the articles of association the directors had power to determine their own quorum, and therefore it is conceivable that one director might constitute a quorum and issue the shares. In the Companies Act, 1862 (25 & 26 Vict. c. 89), the word "capital" is used in more senses than one. Sometimes it means the nominal capital, and sometimes the issued capital: see, for instance, s. 8, sub-s. 5, and s. 34 as compared with s. 12. Sect. 112 of the Stamp Act, 1891, adopted the machinery of s. 34 of the Companies Act, 1862, and imported the expression "registered capital" from that section. Sect. 34—which will be superseded by s. 44 of the Companies (Consolidation) Act, 1908, containing similar words, when it comes into operation on April 1, 1909—speaks of an increase in the capital beyond the registered capital, that is, the nominal capital, and requires notice of the increase to be given to the registrar within fifteen days "from the date of the passing of the resolution by which such increase has been authorized," clearly shewing that the resolution of the company is regarded as the effective cause of the increase of the nominal and therefore of the registered capital. Sect. 112 of the Stamp Act, 1891, ought to be construed in the same way, and confirmation of this

view of the meaning of s. 112 is supplied by s. 5 of the Revenue Act, 1903, which requires any statement of an increase of registered capital of a company under s. 112 of the Stamp Act, 1891, to be delivered to the registrar within fifteen days "after the passing of the resolution by which the registered capital is increased." That section points to the resolution of the company as itself effecting the increase of registered capital, and not the subsequent issue of that capital by the directors. The governing act is the resolution of the company, and not the issue of the shares by the directors. Table B in Sched. I. to the Companies Act, 1862, of the fees to be paid to the registrar for the registration both of the nominal capital of a company and also of any increase of capital shews that an increase of capital to be registered is an increase of nominal capital. Sect. 113 of the Stamp Act, 1891, supports this contention, because, in providing for a similar duty in the case of corporations and companies where the liability of shareholders is limited otherwise than by registration with limited liability, the duty is payable in respect of "any increase of the amount of nominal share capital." The two cognate sections ought to be construed in the same way. [They referred to *In re Bank of Hindustan, China, and Japan; Campbell's Case.* (1)]

Sir R. B. Finlay, K.C., and *A. B. Cane*, for the defendants. The increase of the registered capital was made as and when the directors issued the shares. The question depends entirely upon the language of s. 112 of the Stamp Act, 1891, read with s. 5 of the Revenue Act, 1903. Under s. 112 there must be an actual increase of registered capital to attract the duty. Sect. 5 of the later Act simply imposes a limit of time for sending the statement of the amount of the increase to the registrar, namely, fifteen days after the passing of the resolution by which the registered capital is increased. The capital was not increased by the mere passing of the resolution by the company; it was increased by the resolution of the directors, with the sanction of the company in general meeting, issuing the shares. Sect. 12 of the Companies Act, 1862, gives a company power to alter its memorandum of association so as to increase its capital

(1) (1873) L. R. 9 Ch. 1.

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by the issue of new shares, and table A in Sched. I., art. 26, carries that out by authorizing the directors, with the sanction of a special resolution of the company previously given in general meeting, to increase its capital by the issue of new shares. It is clear that a resolution of the company under that article would not of itself increase the capital of the company. Article 42 of the articles of association in the present case gives the directors power, with the sanction of a general meeting, to increase the capital by the creation of new shares; and by article 118 the directors have the general conduct and management of the business of the company, and may exercise all such powers of the company and do all such acts as are not by the statute or by the articles declared to be exercisable or capable of being done only by the company in general meeting. The increase of the capital is made by the directors, who have the powers of the company, though a fetter is placed upon their acts by article 42 requiring the sanction of a general meeting of the company. The company by the resolution delegated to the directors the power of creating and issuing the capital, and therefore they could not create or issue the capital themselves so long as that resolution remained in force: *Automatic Self-Cleansing Filter Syndicate Co.* v. *Cuninghame.* (1) "Registered capital" does not mean authorized capital. Suppose that the company had authorized the directors to increase the capital without fixing any limit of amount, it could not be contended that the capital was unlimited in amount and chargeable with duty upon that basis. In such a case the capital would not be increased until the directors acted upon the resolution and issued shares, and then only to the extent of such issue. So too in the present case there was no increase of capital until the directors acted upon the resolution, and the sanction of the company given beforehand and allowing a discretion to the directors as to the number of shares to be issued from time to time was perfectly regular. The sanction was given to a future act of the directors by a resolution increasing the nominal capital up to the limit of 5,000,000*l.* The resolution of the company did not increase the nominal capital. The "registered

(1) [1906] 2 Ch. 34.

capital" in s. 112 of the Stamp Act, 1891, means the nominal capital of the company originally registered when the company was incorporated. It is not permissible to construe a section of a statute by looking at another section of a different Act dealing with a different subject-matter. But if s. 34 of the Companies Act, 1862, can be looked at, it may well apply to a case where an effective resolution of the company increasing the capital has been passed and the directors have only the ministerial duty of carrying that resolution out at once and issuing the necessary shares. No such resolution has been passed in this case, the resolution merely authorizing the directors themselves to increase the capital. Nor has s. 113 of the Stamp Act, 1891, any bearing upon the construction of s. 112, as it relates to a different class of companies, of which *Midland Ry. Co.* v. *Attorney-General* (1) is an illustration. The Crown, therefore, are only entitled to duty upon the increase of 3,000,000*l.* capital created and issued by the resolutions of the directors.

Sir S. T. Evans, S.-G., was not called upon to reply.

CHANNELL J. In this case the question is not free from difficulty, but I have come to a clear opinion upon it. The word "capital" both in the Acts relating to companies and in common parlance is often used in quite different senses. In the Companies Acts the scheme is that there shall be a maximum limit of the capital which a company are authorized to raise, leaving it to the company to issue that capital as and when they think convenient and suitable. The Companies Acts also authorize a company to take power in their regulations to alter that maximum amount. That course of legislation was started by the Companies Act, 1862, and has continued since that time. In 1891, partly, no doubt, for the purpose of raising revenue, and partly also, I think, for the purpose of preventing companies from taking power to raise a larger amount of nominal capital than they are likely to require or to get from the public, and of inducing them only to ask for that amount of capital which they are likely to require or to obtain from the public, ad valorem stamp duty was imposed upon the nominal share capital of

(1) [1902] A. C. 171.

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a company, that is, the amount which the company are authorized to raise. That being the case with the capital which a company are authorized in the first instance to create, a similar duty is imposed upon any increase which the company may subsequently make in the amount of their nominal capital. That appears to me to be the scheme of the legislation upon this point.

I must now examine the exact words of the section for the purpose of seeing how that scheme has been carried out. The section upon which the question depends is s. 112 of the Stamp Act, 1891, though no doubt it is quite legitimate to look at other sections which affect the matter so as to see if they throw any light upon the section. Sect. 112 provides that "a statement of the amount which is to form the nominal share capital of any company to be registered with limited liability shall be delivered to the Registrar of Joint Stock Companies in England, Scotland, or Ireland, and a statement of the amount of any increase of registered capital of any company now registered or to be registered with limited liability shall be delivered to the said Registrar," and stamp duty shall be payable thereon. The question seems to me to turn upon the meaning of the words "increase of registered capital." What is that which is to be increased in order to attract the duty? It seems to me to be clear that it is the maximum limit of the capital which the company are authorized to ask from the public, that is to say, the nominal capital. The Act contemplates that just as the amount of the original nominal capital is registered, and is therefore open to the inspection of the public, so also any increase of that registered capital will itself be registered and open to public inspection, so that any one can, by looking at the register, see at once what is the maximum amount of capital which the company are authorized to raise. Therefore it seems to me that "registered capital" means, not the capital which has been actually issued, but the authorized capital, that is, the maximum amount of capital which the company are authorized to raise. When that capital is increased the company have to pay ad valorem duty on the increase. When was that maximum amount increased in the present case? Whatever difficulty there may be seems to me to arise from the form

of the resolutions. I do not myself think that the resolutions exactly follow the authority given by article 42 of the articles of association. Neither side considered the matter of any importance to the argument, and no doubt it is not; but it seems to me to have given rise to the difficulty, such as it is, in the case. The article appears to contemplate that the board shall prepare a scheme for an increase of capital, and that that scheme for that particular increase shall receive the sanction of the company in general meeting before it becomes operative. In the present case the general meeting of the company was held first, and a very general authority was given to the directors. It is unnecessary for me to consider, and therefore I express no opinion upon it, whether that invalidates the proceedings; very probably it does not; but the form in which the matter was carried out creates the difficulty. The resolution passed at the general meeting of the company was that "the directors be, and they are hereby, authorized to increase the capital of the company by an amount not exceeding the nominal sum of 5,000,000*l.*, by the creation and issue from time to time of new ordinary shares of 5*l.* each." That seems to me to mean that the nominal capital, that is to say, the authorized capital, is increased by 5,000,000*l.* The directors are given power to increase the capital by the creation and issue from time to time of new ordinary shares. When the directors do that, they increase the actual or issued capital of the company; the resolution of the company has already increased the maximum authorized capital. It may be that the form in which the matter was carried out was adopted with the view of escaping the payment of duty upon the full amount of 5,000,000*l.*; but if that was the object, it has not succeeded. The company have fixed the maximum limit of capital which can be raised, and it is that maximum limit which is taxed under s. 112. Certain sections of the Companies Act, 1862, have been referred to as shewing that "capital" is used sometimes as meaning the authorized capital and sometimes as meaning the actual capital issued. In my opinion the expression "registered capital" in s. 112 of the Stamp Act, 1891, is used in the sense of authorized capital, namely, the maximum amount which there is power to raise, and the resolution of the company

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has increased that authorized capital. Stamp duty is therefore payable as claimed by the Crown.

Judgment for the Crown.

Solicitor for the Crown: *Solicitor of Inland Revenue.*
Solicitors for defendants: *Ashurst, Morris, Crisp & Co.*

W. F. B.

C. A.
1909
Jan 11.

[IN THE COURT OF APPEAL.]

PAQUINE *v.* SNARY.

Practice—Receiver—Equitable Execution—Weekly Payment by Husband to Wife under Order of Court of Summary Jurisdiction—Summary Jurisdiction (Married Women) Act, 1895 (58 & 59 *Vict.* c. 39), *ss.* 4, 5.

The Court has no jurisdiction, on the application of a judgment creditor of a married woman who has obtained a separation order from her husband under the Summary Jurisdiction (Married Women) Act, 1895, to appoint a receiver by way of equitable execution of a weekly sum ordered by the Court of summary jurisdiction to be paid by the husband to his wife for her maintenance.

Watkins v. *Watkins*, [1896] P. 222, considered and applied.

APPEAL of the defendant from an order of Phillimore J. at chambers.

In July, 1903, the defendant, a married woman, made a complaint before a metropolitan police magistrate under the provisions of s. 4 of the Summary Jurisdiction (Married Women) Act, 1895, that her husband had unlawfully deserted her, and a summons was issued calling upon her husband to answer the complaint. At the hearing of the summons on July 9, 1903, the magistrate found that the matter of the complaint was true, and made an order under s. 5 of the Act that the applicant be no longer bound to cohabit with her husband, and that her husband should pay to her the weekly sum of 20*s.*, which the Court considered reasonable, having regard to the means of both the husband and wife. Since the date of the order the defendant and her husband had lived apart, and the weekly sum of 20*s.* had been paid to the defendant under the order.

On December 5, 1907, the writ in the present action was issued by the plaintiff to recover a sum of 34*l.* in respect of goods sold

and delivered, money lent, and life insurance premiums paid. The action was referred to a Master under Order XIV., r. 7, who found that the plaintiff was entitled to recover the full amount of her claim, and on January 27, 1908, judgment was signed for the amount of the debt and costs. Upon an examination as to means the defendant stated that she had no property of any kind, but that she received through her solicitor the weekly sum of 1*l.* payable by her husband under the magistrate's order. In November, 1908, the plaintiff applied by summons at chambers that she might be appointed receiver in the action, without remuneration and without giving security, "to receive the rents, profits, and moneys receivable in respect of the defendant's interest in the following property, viz.: A weekly sum of 20*s.* payable to the defendant by Henry Boon Snary, of . . . . pursuant to an order under the Summary Jurisdiction (Married Women) Act, 1895, dated the 9th day of July, 1903, in satisfaction of the sum of 37*l.* 7*s.* 4*d.* due under the judgment in this action." On November 18, 1908, a Master made an order in the terms of the summons, but by the order limited the weekly sum to be received by the plaintiff to not more than 10*s.* Upon appeal to Phillimore J., the learned judge, after consideration, affirmed the decision of the Master. The defendant appealed.

Craig Henderson, for the defendant. There is no jurisdiction to appoint a receiver by way of equitable execution of a weekly sum ordered by a magistrate to be paid by a husband to his wife under the Act of 1895. There is a direct analogy to the case of permanent alimony payable under the order of a judge of the Probate Division in cases of judicial separation, and permanent alimony has always been held to be unassignable and inalienable: *In re Robinson*. (1) The wife cannot deprive herself of the benefit of it by anticipation. The appointment of a receiver is essentially a compulsory assignment of the defendant's allowance. The allowance is intended for the defendant's maintenance, and the magistrate has fixed 20*s.* a week as a reasonable sum for that purpose. The Court is now in effect being asked to act as a Court of appeal from the magistrate on a question of fact.

(1) (1884) 27 Ch. D. 160.

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A. S. Poyser, for the plaintiff. The order was rightly made. An order for alimony is in the nature of a judgment, and therefore a wife who has obtained such an order can get a receiver appointed on her own behalf of her husband's interest in settled funds: *Oliver* v. *Lowther*. (1) That being the effect of the order, a debt becomes due week by week from the husband to the wife.

[VAUGHAN WILLIAMS L.J. It is quite certain that the weekly payment is not constituted a debt for bankruptcy purposes. (2)]

The Court has jurisdiction to grant equitable execution by the appointment of a receiver of sums of money payable to a judgment debtor to which garnishee proceedings are not applicable: *Westhead* v. *Riley* (3); and garnishee proceedings do not apply in the present case. The learned judge at chambers decided the case upon the authority of *Clark* v. *Clark*. (4)

[VAUGHAN WILLIAMS L.J. In that case the amount was fixed in a separation deed by agreement of the parties.]

The defendant is in the position of a feme sole, and this property was not subject to any restraint on anticipation; there is no possibility of the plaintiff getting payment of this judgment debt in any other way.

[FARWELL L.J. The judgments in *Watkins* v. *Watkins* (5) apply to the present case; I do not see how that case can possibly be distinguished.

VAUGHAN WILLIAMS L.J. Do you admit that this money is inalienable?]

Yes; it is not assignable by any act of the defendant herself. [He also cited *Salt* v. *Cooper* (6); *Birmingham Excelsior Money Co.* v. *Lane* (7); *Manning* v. *Mullins*. (8)]

Craig Henderson was not called on to reply.

VAUGHAN WILLIAMS L.J. I am of opinion that this appeal must succeed. One feature about the case seems to me to be conclusive, which is that this weekly sum, which was ordered by

(1) (1880) 28 W. R. 381.
(2) See *Kerr* v. *Kerr*, [1897] 2 Q. B. 439; *In re Hawkins*, [1894] 1 Q. B. 25.
(3) (1883) 25 Ch. D. 413.
(4) [1906] P. 331.
(5) [1896] P. 222.
(6) (1880) 16 Ch. D. 544.
(7) [1904] 1 K. B. 35.
(8) [1898] 2 I. R. 34.

the magistrate under s. 5 of the Act of 1895 to be paid to the defendant by her husband, is not assignable by the defendant and is in law inalienable. It is plain that equitable execution cannot properly be granted in order to enable a judgment creditor to seize money so paid, when the payments are admitted to be inalienable. It is not necessary for the purpose of this judgment that I should say anything further; but I cannot help seeing that this allowance is an allowance of such a nature that it is not desirable that it should be capable of being seized by an execution creditor by any process whatsoever. The defendant's husband was ordered to pay her this weekly sum because his conduct had been such as to necessitate the making of the separation order; and it obviously could not have been the intention of the Legislature that a wife, though continuing to be supported by her husband, should be placed in such a position that the money intended by the statute for her support should be taken by her judgment creditors and applied to payment of her debts, which clearly may not be in any sense for her support. Therefore, putting aside the question of the payments being inalienable, I am of opinion that the conclusion at which we have arrived is reasonable and proper.

FARWELL L.J. I agree, and for the same reasons which influenced the Court of Appeal in *Watkins* v. *Watkins*. (1) Permanent alimony under the Divorce Act, 1857, in cases of judicial separation had always been inalienable, and in *Watkins* v. *Watkins* (1) it was held that permanent maintenance ordered under the Divorce Act, 1866, in cases of divorce was equally inalienable, and the reasons given for that decision apply in their entirety to the present case. I am of opinion that this appeal should be allowed.

KENNEDY L.J. I agree and have nothing to add.

Appeal allowed.

Solicitors for plaintiff: *Sidney Smith & Son.*
Solicitor for defendant: *G. Aplin Nichols.*

(1) [1896] P. 222.

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[COURT OF CRIMINAL APPEAL.]

THE KING *v.* BEST.

Criminal Law—Evidence—Admissibility—Prisoner in custody—Statement in reply to Question put by Police Constable—Validity of Conviction.

The fact that a prisoner's statement is made by him in reply to a question put to him by a police constable after he is in custody does not of itself render the statement inadmissible in evidence.

Reg. v. *Gavin*, (1885) 15 Cox, C. C. 656, overruled.

APPEAL by the prisoner E. S. Best from his conviction The prisoner was indicted at the Staffordshire quarter sessions for having on September 14, 1908, at the borough of Smethwick feloniously stolen by means of a trick 10*s.* in money, the moneys of William McMillan. The prisoner pleaded not guilty.

At the trial evidence was given to the following effect:—About 9.30 A.M. on September 14, 1908, the prisoner came to Mr. McMillan's shop and asked a female assistant who was serving if she could do with 5*l.* worth of silver. She told him she could. He then emptied some silver on the counter out of a bag. She counted it. It amounted to 5*l.* She put the silver in the till and gave him five sovereigns. She turned her head away from the counter for a few seconds. The prisoner then said, "You have made a mistake, Miss, and given me 4*l.* 10*s.*" She said, "I am almost certain I gave you 5*l.*" He said, "No, look, here is the half-sovereign." He held half a sovereign up in his fingers. She said, "Well, if I have made a mistake I must give you the other half-sovereign." She then gave him another half-sovereign.

Evidence was also given by a police constable that on November 20, 1908, while the prisoner was in custody, and after he had been charged with two offences other than that charged in the above indictment, namely, of stealing and attempting to steal on September 14, 1908, by means of a similar trick, 10*s.* from Pearce Wedge and A. E. Sherriff respectively, and cautioned that anything he said would be given in evidence against him, he was searched by the constable, who found the sum of 31*l.* 10*s.* 8½*d.* upon him. The constable thereupon asked the prisoner where he had the money from. The prisoner replied,

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"Some of it is mine. The biggest part I have got by this trick."

The prisoner was not charged with stealing the 10*s.* which formed the subject of the present indictment until November 26, 1908. The jury found the prisoner guilty.

The prisoner appealed from his conviction upon the ground (inter alia) that the evidence of his reply to the constable was not legally admissible, inasmuch as it was a statement alleged to have been made by the prisoner to the police constable in reply to his question, the question having been put while the prisoner was in custody.

J. Wylie, for the prisoner. The prisoner ought not to have been questioned after he was in custody, even though he was previously cautioned. The statement made by the prisoner in answer to the question is inadmissible as evidence: *Reg.* v. *Gavin* (1); *Reg.* v. *Male and Cooper.* (2)

H. G. Farrant, for the prosecution, was not called upon.

The judgment of the COURT (Lord Alverstone C.J., Channell and Walton JJ.) was delivered by

LORD ALVERSTONE C.J. There is no ground for interfering in this case. It is quite impossible to say that the fact that a question of this kind has been asked invalidates the trial. There are many cases in which the prisoner is entitled to give an explanation as to anything found on him, and the question might give him an opportunity of saying and shewing that the thing found was his own property. In our opinion *Reg.* v. *Gavin* (1) is not a good decision, and it is commented on in a note printed at the end of the report. The decision has certainly not been followed to its full extent. As set out in the report the statement of the law is too wide and requires qualification. It is quite impossible to say the conviction is bad.

Appeal dismissed.

Solicitor for prosecution: *The Director of Public Prosecutions.*

Solicitor for prisoner: *The Registrar of the Court of Criminal Appeal.*

(1) 15 Cox, C. C. 656. (2) (1893) 17 Cox, C. C. 689.

J. E. A.

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[IN THE COURT OF APPEAL.]

ATTORNEY-GENERAL *v.* HERBERT TILL.

Revenue—Property and Income Tax—Return of Profits under Sched. D—"Deliver statement as aforesaid"—Failure to deliver a true and correct Statement—Illusory Statement—Income Tax Act, 1842 (5 & 6 *Vict. c.* 35), *ss.* 52, 55.

Sect. 55 of the Income Tax Act, 1842, which imposes a penalty in case a person chargeable refuses or neglects "to deliver any . . . . statement as aforesaid" of his average profits under Sched. D, applies only to non-delivery as distinct from delivery of an imperfect or inaccurate statement.

Lord Advocate v. *Sawers*, (1897) 35 Sc. L. R. 190; 3 Tax Cases 617, not followed on this point.

The delivery of a merely illusory statement will not be a compliance with the requirements of this section.

The defendant had made some yearly returns of his average net profits which were admittedly inaccurate; when the mistake was discovered by the revenue authority he offered to pay the difference on the last year's return, but not for inaccuracies in previous years which were statute-barred. This offer was declined, and an information was laid by the Attorney-General claiming the 50*l.* penalty:—

Held, reversing the decision of Lord Alverstone C.J., that as the defendant had delivered a statement, though inaccurate, he was not liable to the penalty, and the action must be dismissed.

This was an appeal from a judgment of Lord Alverstone C.J., sitting with a special jury, which raised a question on the construction of s. 55 of the Income Tax Act, 1842, which imposes a penalty on a person chargeable for refusing or neglecting to deliver "as aforesaid" a statement of his profits under Sched. D for the purposes of income tax, the point being whether that section applied only to non-delivery as distinct from delivery of an inaccurate statement. The facts, so far as material, were as follows:

The defendant, Herbert Till, was a solicitor practising in Dorchester. In the year 1899 the defendant purchased a practice there from the representatives of one Coombs, the purchase-money being the payment by him to Mrs. Coombs (the widow) of an annuity of 200*l.* out of the business for fifteen years.

In 1901 the defendant married Mrs. Coombs.

In the years 1903, 1904, and 1905 the defendant, in making out his statement of average profits under Sched. D of the Income Tax Act, 1853, did not include this 200*l.* annuity as part of the profits of the business.

In 1906 the annuity was again not included as part of the profits of the business, and this and the previous omissions having been discovered by the revenue authority, some correspondence ensued, with the result that the defendant offered to pay the difference on the last year's return, but refused to pay for the inaccuracies of previous years, some of which were statute-barred. The Commissioners of Inland Revenue declined to accept this offer, and this action was commenced by information at the instance of the Attorney-General against the defendant for neglecting to deliver to the assessor of the district a true and correct statement in writing of his profits and gains chargeable with income tax under Sched. D of the Act 16 & 17 Vict. c. 34 for the year ending 1906, contrary to the provisions of the Act 5 & 6 Vict. c. 35, ss. 52 and 55, and claiming the 50*l.* penalty.

At the trial the jury found that the mistake had been made in consequence of the defendant's own negligence. Lord Alverstone C.J. held that, if the return was incorrect, prima facie an offence entitling the Crown to the penalty had been committed, and he accordingly gave judgment for the Crown for 50*l.* and costs.

The defendant appealed.

The *Appellant* in person. So long as a list, declaration, or statement of some kind has been delivered, no penalty can be enforced. The wording of s. 55 of the Income Tax Act, 1842 (1),

(1) Sect. 55 is as follows: "And be it enacted, that if any person who ought by this Act to deliver any list, declaration, or statement as aforesaid shall refuse or neglect so to do within the time limited in such notice, or shall under any pretence wilfully delay the delivery thereof, and if information thereof shall be given, and the proceedings thereupon shall be had, before the Commissioners acting in the execution of this Act, every such person shall forfeit any sum not exceeding twenty pounds, and treble the duty at which such person ought to be charged by virtue of this Act, such penalty to be recovered as any penalty contained in this Act is by law recoverable, and the increased duty to be added to the assessment,

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applies only to non-delivery. The words "as aforesaid" qualify either the verb "ought" or the infinitive "to deliver," and do not qualify the nouns substantive "list, declaration, or statement." The words are not "deliver any such list, declaration, or statement as aforesaid": the true meaning of this part of the section is "any person who is by this Act required as aforesaid to deliver" a list, declaration, or statement. No reference is intended to any "true and correct statement" such as is spoken of in s. 52; the "statement" required is that referred to in s. 48. The mere fact that a statement when delivered is inaccurate is not to subject the person making it to this heavy penalty. Sect. 67 provides for returns by tenants of the actual amount of rent received, and by s. 68 penalties are imposed on "any person who shall wilfully deliver any such account as aforesaid which shall be false," thus shewing that the Legislature contemplated that there might be a delivery of an account of the actual rents even though that account is not accurate.

Then, again, ss. 127, 128, and 129 contain provisions not of a final character for rectifying any omission or wrong statement in a list or schedule. Sect. 127 also draws a distinction between non-delivery of a statement and the case where a statement has been delivered which has been surcharged as erroneous. Sects. 177 and 178 impose penalties on certain persons who neglect or

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but, nevertheless, subject to such stay of prosecution or other proceedings by a subsequent delivery of such list, declaration, or statement in the case following: (that is to say) if any trustee, agent, or receiver, or other person hereby required to deliver such list, declaration, or statement on behalf of any other person, shall deliver an imperfect list, declaration, or statement, declaring himself unable to give a more perfect list, declaration, or statement, with the reasons for such inability, and the said Commissioners shall be satisfied therewith, the said trustee, agent, or receiver, or other person as aforesaid, shall not be liable to such penalty in case the Commissioners shall grant further time for the delivery thereof; and such trustee, agent, receiver, or other person shall, within the time so granted, deliver a list, declaration, or schedule, as perfect as the nature of the case will enable him to prepare and deliver; and every person who shall be prosecuted for any such offence by action or information in any of Her Majesty's Courts, and who shall not have been assessed in treble the duty as aforesaid, shall forfeit the sum of fifty pounds."

refuse to make out and deliver certain statements within a stated time, or make any false or untrue return, or are guilty of fraud, shewing that it was intended to make a distinction between failure to make a return at all and failure to be accurate in the return when made; and, further, the penalty imposed by s. 178 is less than the penalty which according to the contention of the Crown is imposed by s. 55 for an innocent or trifling mistake; that cannot be what was intended. The revenue is fully protected against mistake by the power given to the Commissioners under s. 113 to assess a person making default, and by ss. 161 and 162 to surcharge.

An examination of the wording of these other sections does not shew that the Court must attribute to the phrase "deliver such statement as aforesaid" any other than its normal meaning, which is satisfied by the delivery of a statement which purports to be in compliance with the list, statement, or declaration required.

This being a penal section, the Court must not construe it more strictly than it is obliged to do. The other sections in the Act, providing for amendment of the return and for surcharging, would be meaningless if the present contention of the Crown is correct. Where an account is ordered to be delivered by a trustee or other person accountable, the fact that it is subsequently surcharged does not make it a non-delivery, and the same meaning should be attached to s. 55.

Sir S. T. Evans, K.C., S.-G., and *W. Finlay*, for the Crown. No assistance can be obtained as to the construction of s. 55 by looking at the penalties provided by the subsequent sections of the Act. In construing these fiscal statutes an equitable construction is not admissible, as was said by Lord Cairns in *Partington* v. *Attorney-General.* (1) A reasonable and fair construction must be placed upon the words: *Gilbertson* v. *Fergusson* (2), where the rule of construction for these Acts is again stated. The Court need not be troubled at the apparent hardship of these penalties, because the Commissioners have power to relieve against them, and as a fact the penalties are very seldom exacted. Sect. 47, providing for general notices, and

(1) (1869) L. R. 4 H. L. 100, at p. 122. (2) (1881) 7 Q. B. D. 562, at p. 572.

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s. 48, providing for particular notices served on persons chargeable, are the foundation of the right to require "a statement" to be sent in; the latter part of s. 48, relating to the "penalty for such refusal or neglect" to deliver a list, refers to s. 55.

Sect. 49 prescribes the place and time for such delivery, and s. 50 requires a person to deliver a list containing "to the best of his belief" a list of lodgers and employees, and there is a proviso that the person "shall not be liable to the penalties hereinafter mentioned," which means the penalties imposed by s. 55, for the omission of a name if it shall appear that the omitted person is exempt; this shews that the person is contemplated as having delivered a list, because an omission in the list is referred to, and yet he is contemplated as being subject to penalties. Then by s. 52 "a true and correct statement" is to be delivered of the annual value and amount of profits arising to such persons from all sources chargeable under the Act. The words, therefore, in s. 55, "as aforesaid," relate to and qualify the nouns "list, declaration, or statement" so as to introduce the prior sections, and in the case of a person chargeable, as here, the words from s. 52, namely, "a true and correct statement." The statement delivered by the appellant was admittedly not correct, and he is therefore liable to the penalty. In s. 56 the words are "such statement as before required," which is the equivalent for "such statement as aforesaid" in s. 55.

Sect. 129, which provides for rectifying an omission or wrong statement, throws light on s. 55; it also applies to s. 128.

Sect. 178, relied on by the appellant as inconsistent with the contention of the Crown, in fact provides a cumulative punishment in cases of fraud. [Sects. 111, 117, 118, 120, 122, and 166 were also cited.]

The case is really concluded by *Lord Advocate* v. *Sawers* (1), where it has been expressly laid down that the penalty imposed by s. 55 is incurred either if no statement be delivered at all, or if the statement delivered be untrue or incorrect. That decision is not binding on this Court, but decisions of co-ordinate jurisdiction are usually followed by all Courts in revenue cases for the sake of uniformity. That decision, however, is correct, and

(1) 35 Sc. L. R. 190; 3 Tax Cases, 617.

it has been acted upon ever since as expressing the correct interpretation of s. 55.

The *Appellant*, in reply.

Cur. adv. vult.

Feb. 17. COZENS-HARDY M.R. This appeal raises the question whether a man who has delivered a statement of his income chargeable with property tax which, through negligence or carelessness but without fraud, is incorrect is liable to a penalty of 50*l.* under s. 55 of the Income Tax Act, 1842. That Act is so framed that it is difficult, if not impossible, to arrive at a clear and satisfactory conclusion, and I confess that my views have fluctuated in the course of the discussion. But upon the whole I think the arguments on the part of the appellant ought to prevail and the question ought to be answered in the negative.

Now it is necessary to refer to other sections of the Act of 1842 before approaching s. 55. Sect. 47 provides for a general notice, to be published as prescribed, requiring all persons falling within the subsequent provisions of the Act to make out and deliver lists, declarations, and statements. Sect. 48 provides for a personal or particular notice to the like effect, and in case of refusal or neglect to make out "such lists, declarations, or statements as may be applicable to such person and as the case may require, and deliver the same," the Commissioners shall issue a summons to such person making default as aforesaid in order that the penalty for such refusal or neglect may be duly levied. These words clearly refer to s. 55. Sect. 49 prescribes the place and time of delivery. Sect. 50 requires a person to prepare and deliver a "list" containing "to the best of his belief" the names and addresses of any lodgers or employees; and there is a proviso that no person shall be "liable to the penalties hereinafter mentioned" for any omission if the employee is found to be entitled to exemption from all duties. Sect. 51 requires trustees for other persons chargeable in certain circumstances to prepare and deliver a list containing a true and correct statement. Sect. 52 deals with a person who is himself chargeable and requires such person to prepare and deliver "a true and correct statement" containing (inter alia) the amount of the

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profits or gains arising to such person from all and every the sources chargeable under the Act. Sects. 53 and 54 do not call for special notice. Sect. 55 is ungrammatical and almost unintelligible. It is as follows: [Having read the section, his Lordship continued:—] On the one hand it is contended that the words "as aforesaid" refer to the previous sections, and that the first lines of the section must be read thus: "If any person who is required by the prior sections of this Act to deliver a true and correct list, declaration, or statement shall refuse or neglect so to do." The result would be that any error or omission, however slight or however innocent, involves a liability to treble duty and 20*l.* penalty at the hands of the Commissioners, or a penalty of 50*l.* from the High Court. On the other hand it is contended that the section applies only to non-delivery, as distinct from delivery of an imperfect or inaccurate statement. I think the latter is the preferable view for several reasons: (1.) The Act in other sections speaks of a person as having delivered "such account as aforesaid," although it is false: see ss. 68 and 178. (2.) The words "as aforesaid" naturally refer to s. 48, where the words are "make out such lists, declarations, or statements as may be applicable to such person"—that is to say, lists, declarations, or statements of the character appropriate to the particular person, and nothing more. To avoid misconception, I may add that a document may be so illusory that the tribunal would be justified in holding that there had been no delivery; but no such case arises here. (3.) The Act contains provisions not of a penal character for rectifying any omission or wrong statement in a statement or schedule: see s. 129. (4.) The Act imposes a penalty on a false or fraudulent statement which is less severe than that which, on the other hypothesis, is imposed upon an honest mistake: see s. 178. (5.) The proviso in the middle of s. 55, dealing only with the case of trustees acting on behalf of parties chargeable, presupposes non-delivery of any statement, and then authorizes a delivery, after prosecution, of an imperfect list. (6.) The revenue is protected by the power possessed by the Commissioners to assess a person making default (s. 113) and to surcharge (ss. 161, 162).

I am aware that there are some provisions of the Act which support the opposite view. The most weighty seems to be found in s. 50, the section which requires a person to give a list of his lodgers and employees, with a proviso exempting him from a penalty in one event only. Sect. 129 does not, it seems to me, apply to such a list, nor does s. 113 or s. 161. Notwithstanding the difficulty caused by s. 50 and by several other sections, I think the better view is that which I have already expressed.

Thus far I have dealt with the case apart from authority, and in truth there is singularly little authority. After fifty-five years, namely, in 1897, the question was raised in the Scotch Courts in the case of *Lord Advocate* v. *Sawers*.(1) There the Lord Ordinary and the judges of the First Division of the Inner House held that the penalty of 50*l*. was incurred if the statement delivered was untrue or incorrect. Now, with the utmost respect for the learned judges who decided that case, and notwithstanding my strong sense of the importance of uniformity of decision in fiscal matters in all parts of the United Kingdom, I feel unable to decide the present case in accordance with the view adopted in the Scotch Courts. I am not satisfied that the arguments addressed to us were so fully presented to them. The Lord Chief Justice followed the decision in the Scotch Courts and, I think, expressed his own concurrence with their view, but he did not substantially add to their reasoning.

Upon the whole I think this appeal must be allowed with costs here and below.

FLETCHER MOULTON L.J. The only question that is before us for decision in this appeal is the meaning of s. 55 of the Income Tax Act, 1842. So far as is necessary to raise the point, s. 55 reads as follows: "If any person who ought by this Act to deliver any list, declaration, or statement as aforesaid shall refuse or neglect so to do within the time limited in such notice, or shall under any pretence wilfully delay the delivery thereof, and if information thereof shall be given and the proceedings thereupon shall be had before the Commissioners acting in the execution of this Act, every person shall forfeit any sum not

(1) 35 Sc. L. R. 190; 3 Tax Cases, 617.

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exceeding 20*l.*, and treble the duty at which such person ought to be charged by virtue of this Act, such penalty to be recovered as any penalty contained in this Act is by law recoverable and the increased duty to be added to the assessment," and by a later provision the penalty of 50*l.* is made an alternative in case the treble duty has not been inflicted.

Prima facie this appears to enact certain penalties for non-delivery of the lists, &c., referred to. But the Crown contends, and the Court below, following the decision of the Scotch Courts in *Lord Advocate* v. *Sawers* (1), has decided, that the words "to deliver any list, declaration, or statement as aforesaid" bring in all the detailed provisions of the previous sections relating to the form and contents of the lists, &c., and that if a return fails in any respect to comply with any of these provisions its delivery is a nullity, and the person whose duty it is to make the return is liable to the penalties set forth in the section.

It seems a very startling proposition that the slightest inaccuracy in a statement should make its delivery a nullity. It is not in accordance with ordinary legislative usage, and I am of opinion that if the Legislature had intended that this penal clause should have so far-reaching an effect it would have used very different language to express its intention. Moreover, the nature of the penalty raises a presumption that it relates to an absolute non-delivery and not to errors in the statement delivered. It will be seen that the amount of the penalty is "treble the duty at which such person ought to be charged," or, in other words, treble the duty on the whole assessment. That the measure of the penalty should be based on the duty on the whole assessment may be necessary and proper where there is a total failure to make any return whatever, but all justification for this course disappears when a return has been made and the only complaint is that it contains an inaccuracy. On the interpretation contended for by the Crown, the nature and magnitude of the error are immaterial so far as the penalty is concerned. The return must in all respects be in accordance with the direction contained in s. 52, i.e., it must be a true and accurate statement in writing in the form which the Act requires,

(1) 35 Sc. L. R. 190; 3 Tax Cases 617.

signed by the person delivering the same, containing the annual value of the lands and the amount of profit and gains estimated for the period and according to the rules of the Act, and must be made exclusive of profits accruing from the interest of money or other annual payments arising out of the property of any other person for which such other person ought to be charged; otherwise its delivery is of no effect. According to this contention, the error may be innocent or fraudulent, it may be serious or trivial, it may be due to a mistake in fact and perhaps to matters unknown to the person making the return, or it may be due to a mistake in law, the result is the same. Nay, the contention of the Crown cannot logically stop here. It can make no difference whether the result of the mistake is for or against the person making the return, or whether it has no effect on his liability as in the case of a mere misdescription.

The presumption in favour of construing the section as relating to non-delivery only, which is based on a consideration of the nature of the penalty, is raised to a strong probability when we compare it with the penalties under other sections which admittedly deal with errors in the contents of the return. The best example is s. 178, which deals with fraudulent returns. We find that the penalty is three times the difference between the amount which the person making the return ought to be charged and the amount he would be charged according to the assessment based on the fraudulent return made by him. The penalty here depends on the magnitude of the error. It is to my mind incredible that the Legislature should have inflicted a penalty of treble the whole duty on the estate in the case of any mistake, whether honest or not, whatever might be its importance, if when it came to deal specifically with a fraudulent return it inflicted a minor penalty based on the difference in duty which would have been occasioned by the fraud remaining undetected.

A similar remark applies to the penalties in cases of surcharge as set out in s. 127. This section is specially valuable, for it draws a distinction between non-delivery of a statement, in which case the penalty is three times the total assessment, and the case where a statement has been delivered which the Commissioners have surcharged, in which case the penalty is

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three times the surcharge only, and not three times the whole assessment. According to the contention of the Crown, the surcharge, inasmuch as it implies an error in the return, necessarily subjects the person making the return to the major penalty by reason of s. 55, which is wholly inconsistent with the provisions of this section.

The decision of the Court below rests entirely on the interpretation given by the Court to the words "as aforesaid." But in my opinion the Act countenances no such interpretation. On the contrary, it is clear in more than one instance that it uses this language in the sense contended for by the defendant. Take first s. 178. This deals with fraudulent statements and speaks of a person "making or delivering any such statement or schedule as aforesaid which shall be false or fraudulent." The argument of the Crown is that the words "statement as aforesaid" mean a statement which is true and accurate in every particular. Reading these words into it, the words of s. 178 become equivalent to "making and delivering any true and accurate statement which shall be false or fraudulent." I need not dwell on the absurdity of this suggestion.

Sect. 68 again relates to statements by tenants as to rents. Sect. 67 provides that such tenants "shall deliver to the assessor an account in writing signed by such tenant and the actual amount of the annual rent reserved." By s. 68 penalties are enacted on "every person who shall wilfully deliver any such account as aforesaid which shall be false." This again shews that the Legislature contemplates that there may be a delivery of an account of the "actual" rents, even though that account is not accurate.

By s. 177, again, penalties are inflicted on certain persons who "shall neglect or refuse to make out and sign and deliver such declaration or statement as aforesaid within the time before mentioned or shall make any false or untrue return therein in any particular thereof." This shews again that the Legislature intended to draw a clear distinction between failure to make a return and failure to be accurate in the return itself.

The language of these sections appears to me to shew conclusively that there is no ground for attributing to the phrase

"deliver such statement as aforesaid," wherever it occurs, any other than its normal meaning, which is satisfied by the delivery of a statement which purports and is intended to be a compliance with the legislative command, and that it does not connote absolute accuracy. This is the sense in which the language would ordinarily be construed. When in these Courts a person is ordered to deliver an account, the fact that the account is subsequently surcharged does not make it a non-delivery, and the same meaning should be attached to the language used in s. 55, especially as it is a penal clause and should therefore be construed strictly. Indeed the presence in the Act of the elaborate provisions for surcharging the statements delivered shews to my mind that the Legislature contemplated that there would be errors in these statements, just as does the procedure or surcharging accounts directed to be delivered in suits in the High Court, and renders it extremely improbable that the Act should speak of and treat the delivery of a statement containing an error as being a non-delivery of any statement at all.

It remains to consider the case of *Lord Advocate* v. *Sawers* (1), upon the authority of which the decision in the Court below was formally based, although the Lord Chief Justice undoubtedly intimated that his personal view accorded therewith. Judging from the report of the case, it was not very fully argued, and many of the matters which have been brought to our attention in the argument in the present case were not referred to. The decision seems to have turned substantially on the provisions contained in the latter portion of s. 55, which relate only to cases where some person is required to deliver a list, declaration, or statement on behalf of some other person. The section in such a case provides that he may deliver an imperfect list, &c., coupled with a declaration that he is unable to give a more perfect list and the reasons for such inability, and if the Commissioners are satisfied therewith he shall not be liable to the penalty if the Commissioners grant further time, and he shall within the time so granted deliver as perfect a list as the nature of the case will enable him to prepare and deliver. The Court seems to have viewed this as indicating that the

(1) 35 Sc. L. R. 190; 3 Tax Cases, 617.

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penalties under s. 55 were intended to apply to a list which was physically delivered but which was erroneous. With the greatest respect for the high authority of the Court, I cannot accept this view, but on the contrary these provisions appear to me, when carefully studied, to support the contention of the defendant. The Act, both in s. 55 and in s. 129, uses the word "imperfect" to describe such a statement as is referred to, and to my mind it does so because it is dealing with lists or statements which do not purport to be a compliance with the Act, but which actually declare themselves to be incomplete and put forward an excuse for such incompleteness. It is quite in accordance with the ordinary rules of interpretation to hold that the delivery of a list or statement which neither purports nor is intended to be a compliance with the Act should be treated as a non-delivery. It is bad on the face of it. These provisions, therefore, shew that the Legislature is here dealing with a case of non-delivery, and not with the case of the delivery of a list which purports, and is intended, to be in compliance with the Act, but which is erroneous in some particular.

A large portion of the contention on behalf of the Crown was that there was no hardship in enacting these penalties, which are so utterly out of proportion to the gravity of the offence, because the Commissioners have power to relieve against them. I confess that this argument has very little effect in reconciling me to an interpretation which would make the penalties of an unnecessary and almost barbarous severity. I have no doubt that the Commissioners do their duty to the best of their ability, and that in most cases they would exercise their power of relief equitably; but there is a great temptation to use powers of this kind for an indirect purpose, an example of which is given in the present case. The action is for a penalty of 50*l.*, and, if the contention of the Crown be correct, the Court has no jurisdiction to lessen the amount, however trivial the inaccuracy may be. Now in the present case, where no fraud is suggested, the appellant offered to pay the difference in the assessment, but the income tax officers refused to stay their hands unless he would also pay sums for which he would have been liable under a similar mistake in previous years, but which were barred by the

provisions as to limitation of time. It was on his refusal to do so, on the ground that the Legislature had provided that these sums should not be recoverable under the statute, that this action for the penalty of 50*l.* was brought, and it was practically admitted in Court that it was really for the purpose of obtaining these irrecoverable sums, which would altogether be more than covered by the penalty.

If penalties are to be used for indirect purposes such as these, it will be seen that the existence of so tremendous a penalty for any error, however small, must put the taxpayer who has to make the return practically at the mercy of the Commissioners. The existence of an error, however small, in a return would put them in the position of being able to insist that almost any view they might entertain as to the rights of the Crown should be accepted without resistance by the taxpayer, because he would have hanging over his head this gigantic penalty, which must almost necessarily be far greater than any surcharge that the Commissioners might seek to make, for it would be three times the total assessment, including surcharges. I do not think that the Courts ought to listen to the suggestion that His Majesty's subjects are left so defenceless, unless it can be shewn that it is the clear meaning of the Act that they should be so, and therefore this type of argument should not, in my opinion, be allowed to affect the mind of the Court.

BUCKLEY L.J. The question is whether s. 55 of the Income Tax, 1842, is confined to the case of the person who fails to deliver a statement, or fails to deliver any but an illusory statement, or whether it extends to the person who delivers an incorrect statement. It is impossible upon an Act so expressed as is the Act of 1842 to arrive at any conclusion with a feeling of certainty, but, after weighing all the considerations for and against the conclusion at which I have arrived (and there are considerations in each direction), I am of opinion that s. 55 applies only to the case of a person who fails to deliver a statement, or delivers nothing but an illusory statement.

I propose first to consider s. 55 upon its own language as a self-contained section, and then see (as of course I am bound to

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see) whether any light is shed upon the meaning of the language of that particular section by other sections of the Act. The principal contest has raged round the words "as aforesaid" in s. 55 in the sentence "who ought by this Act to deliver any list, declaration, or statement as aforesaid." In my opinion the words "as aforesaid" there qualify either the verb "ought" or the infinitive "to deliver," and do not qualify the nouns substantive "list, declaration, or statement." The words are not "deliver any *such* list, declaration, or statement as aforesaid." The meaning of the sentence, I think, is "any person who is by this Act required as aforesaid to deliver" or "any person who is by this Act required to deliver as aforesaid" a list, declaration, or statement. The contention of the Crown is that the words "as aforesaid" qualify the noun substantive "statement" so as to introduce from s. 52, in the case of the person chargeable, the words "true and correct" as qualifying the word "statement." I think this construction inadmissible. Sect. 55 is addressed alike to, first, the case of the person who under s. 50 is required to deliver a list containing "to the best of his belief" the names of lodgers, and so on; secondly, the person who under s. 51 has to make a true and correct statement of his receipts for another person; thirdly, the person who under s. 52 has, as party chargeable, to deliver a true and correct statement; and, fourthly, the person who under s. 53 has, as trustee or agent, to deliver a true and correct statement. The last half of s. 55 deals, not with all these classes, but only with the trustee, agent, or receiver, or other person required to deliver a list, declaration, or statement on behalf of another person. It contemplates that after a case for a prosecution or other proceedings has arisen the party may "subsequently" deliver an "imperfect list." This is inconsistent with the view that he has already delivered an imperfect list. It must contemplate the case of a person who has failed to deliver any list within the proper time and subsequently stays prosecution or proceedings against himself by subsequently delivering an imperfect list. If this class of person is contemplated by the section as one who, under the first words of the section, has failed to deliver any list, the same must be true of every other person who falls within the section. Sect. 56, I think, bears out

the view that s. 55 is confined to the person who fails to deliver a list, and does not extend to the person who delivers an imperfect list. Sect. 56 is addressed to the case of the person chargeable, and who under s. 52 is required by either a general notice (s. 47) or a particular notice (s. 48) to deliver his statement. Its effect is that if that person has not had a particular notice, and it appears to the Commissioners that he is not liable to income tax, he is relieved from penalties for not delivering "such statement as before required," meaning, I think, a statement of such a kind as before required, and not a true and correct statement of his income.

Passing to other sections of the Act of Parliament, I confess that I am very slow to found my conclusions upon the construction of s. 55 upon a critical examination of the bearing of other words in so ill-expressed an Act of Parliament. Subject to this observation, however, I look at s. 129. Both parties agree (although I think it is matter for doubt) that that section applies not only to the statement or schedule contemplated by the immediately preceding sections of the Act, but also to the statement mentioned in s. 55. If this be so, s. 129 deals with two cases—first, that of the person who has, and, secondly, that of the person who has not, delivered a statement, and as matter of language it refers to the latter as a person subject to a penalty, and does not so refer to the former. This again is subject to a difficulty arising from the use of the word "omission" in the latter part of the section. The word, however, is "omission" only, and not "omission or wrong statement," which are the words at the beginning of the section relative to the person who has delivered a statement. The "omission" in the latter part of the section is, I think, the omission of the person who has not delivered a statement. If this be so, this section contemplates, or at any rate is consistent with the view, that the person who has delivered a statement is not by s. 55 exposed to penalties. Further, upon the words "list, declaration, or statement as aforesaid," even if s. 55 contained, which it does not, the word "such," so that it would run "any such statement as aforesaid," it is noticeable that ss. 68 and 178, using the words "such account as aforesaid" and "such statement or schedule as

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aforesaid," go on to speak of them as being false, or false and fraudulent. In this connection, therefore, the words "such statement as aforesaid" cannot mean true and correct statement, for it is a contradiction to speak of delivering a true and correct statement which is false and fraudulent. On the other hand I agree that s. 50 creates a difficulty. That is a section addressed to the case of the person who has to the best of his belief delivered a list of lodgers. It contains a proviso that that person "shall not be liable to the penalties hereinafter mentioned" (which must, I think, mean the 20*l.* and 50*l.* in s. 55) for the omission of a name if it shall appear that the omitted person is exempt. Here plainly the person is contemplated as having delivered a list, because an omission in the list is referred to, and yet he is contemplated as being subject to penalties. As regards this section, it seems to me to be in these particulars inconsistent with other provisions of the Act to which I have pointed attention, and inconsistent with that which, upon reading s. 55, I hold to be its true meaning. To establish that a penalty clause such as s. 55 is applicable the Crown must, I think, make out that upon a reasonable construction of the Act it plainly imposes the penalty which it is sought to enforce. It follows from what I have said that in my judgment it certainly does not plainly impose, and my opinion is that as matter of construction it does not impose, the penalty at all in the case of a person who has delivered a statement not being an illusory statement. For these reasons I think that the appellant is not liable to the penalty and that this appeal ought to be allowed.

I regret that in arriving at this conclusion I am differing from the decision in Scotland in *Lord Advocate* v. *Sawers* (1), but it would seem from the report that the Court there had not the benefit which we have had of a critical examination of the many difficult sections of this Act of Parliament.

Appeal allowed.

Solicitors: *Lovell, Son & Pitfield; Solicitor for Inland Revenue.*

(1) 35 Sc. L. R. 190; 3 Tax Cases, 617.

W. C. D.

SMITH (Surveyor of Taxes), Appellant *v.* THE LION BREWERY COMPANY, LIMITED, Respondents. 1909 *Feb.* 18, 19.

Revenue—Income Tax—Deductions—Profits of Brewery—Tied Licensed Houses —Compensation Charge—Licensing Act, 1904 (4 *Edw.* 7, *c.* 23), *s.* 3—*Income Tax Act,* 1842 (5 *&* 6 *Vict. c.* 35), *s.* 100, *cases* 1 *and* 2, *r.* 1; *Sched. D.*

A company, which carried on the trade of brewers, were, solely for the purposes and as part of their business and as a necessary incident of the profitable working thereof, the owners of licensed houses which they let to tenants, who covenanted to buy all their beers from the company, and in consideration thereof the tenants paid to the company a less rent than the annual value of the houses would warrant. By means of these houses, which were substantially part of the plant or outfit necessary to carry on the business profitably, the company were enabled to earn increased profits, upon which they paid income tax. The company were compelled, under s. 3 of the Licensing Act, 1904, to allow to the tenants of the licensed houses certain deductions from rent in respect of the company's share of the annual compensation charge imposed on the licensed houses, and the company claimed that, in arriving at the amount of the profits of their trade as brewers assessable to income tax, a deduction ought to be allowed in respect of the sum which they were compelled to pay for the compensation charge, as being an expense incurred in carrying on that trade:—

Held that, as the company's share of the compensation charge was payable by them as owners of the licensed houses towards forming a fund to compensate those who were interested therein for the loss of the trade carried on there, and as that trade was the tenants' trade, though the company were interested in it, the company's share of the compensation charge was not a disbursement or expense wholly and exclusively laid out or expended for the purposes of the company's trade as brewers within the meaning of s. 100, cases 1 and 2, r. 1, of the Income Tax Act, 1842, Sched. D, and that therefore the company were not entitled to any deduction in respect thereof.

Case stated by Commissioners for the General Purposes of the Income Tax Acts.

1. At a meeting of the Commissioners for the General Purposes of the Income Tax Acts (Second East Brixton Division) held at the Session House, Newington Causeway, in the county of Surrey, on November 13, 1906, the Lion Brewery Company, Limited, appealed against an assessment of 44,652*l.* (after deduction of the deduction allowed for diminished value by reason of wear and

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tear during the year of machinery and plant, pursuant to 41 & 42 Vict. c. 15, s. 12) made upon them for the year ending April 5, 1907, under Sched. D of the Income Tax Acts in respect of the profits arising from the business of brewers and sellers of beer carried on by them.

2. The facts stated in paragraphs 3 to 8 inclusive of this case were established as such to the satisfaction of the Commissioners.

3. The Lion Brewery Company, Limited (hereinafter called the respondents), were, as part of their business and as a necessary incident of the profitable exploitation of such business, the owners of certain freehold licensed premises, and also lessees of other licensed premises, all of which premises had been acquired by the respondents, and were held by them, in the course of and solely for the purposes of their said business. The premises were let by the respondents to tenants, who covenanted to deal only with the respondents in the way of their business, and in consideration thereof and the purchase of beers from the respondents they paid a much less rent than the annual value of the premises would warrant. By these means and the possession and use of the premises, which were employed by the respondents as substantially part of their plant or outfit necessary to carry on the business profitably, the respondents were enabled to earn and did earn profits upon which they paid income tax, and which without the said premises and their use in and for carrying on their business would be much less in amount.

4. The profits of the respondents had always been greatly increased by reason of the employment and use of such premises in and for the purposes of the respondents' business, and to enable the respondents to earn the profits upon which they were assessed to the income tax the possession and employment as aforesaid of such premises were essentially necessary, and except for the purposes of and employment in their business of such premises the respondents would not possess them. They did not possess them as investments or for the purposes of investments. If any house lost its licence the respondents as soon as possible got rid of it.

5. Under and by virtue of the Licensing Act, 1904, s. 3, the respondents were compelled to allow, and allowed, to their

tenants such deductions from rent as were provided for by the statute.

6. The respondents in their turn, when paying rent in respect of such of the premises as were rented by them, deducted from such rent such deductions as were authorized and directed by the Act.

7. The net result produced by such deductions as are above mentioned in paragraphs 5 and 6 was that the respondents were compelled to pay, and did pay, in respect of the year ending December 31, 1905, in respect of charges imposed by the Act an amount of 3600*l.*, no part of which was returned or made up or allowed to them, and was borne and paid by the respondents out of their own moneys.

8. None of the premises in respect of which the deductions resulting in the sum of 3600*l.* were made were in the occupation of the respondents.

9. The respondents contended that, having regard to the facts in arriving at their assessable profits of their business for the year ending December 31, 1905 (being the last of the three years in respect of which the assessment for the year ending April 5, 1907, made upon the respondents was based), they were entitled to take into consideration and to have, pursuant to the Income Tax Acts, a deduction allowed to them in arriving at the assessable amount of their profits in respect of the sum of 3600*l.*

10. For the Crown it was contended, inter alia, that the respondents had to bear and pay the sum of 3600*l.* as landlords or owners of licensed premises, and not as brewers or traders, and that the deduction claimed was not one which could be allowed under 5 & 6 Vict. c. 35, s. 100, case 1, rr. 1 and 3, and r. 1 of the "Rules applying to both the preceding cases," namely, cases 1 and 2, or otherwise, and that the deductions were deductions in respect of capital.

11. The following cases were referred to: *Watney & Co.* v. *Musgrave* (1), *Brickwood & Co.* v. *Reynolds* (2), and *Hancock & Co.* v. *Gillard.* (3)

12. The Commissioners were of opinion, on a consideration of

(1) (1880) 5 Ex. D. 241. (2) [1898] 1 Q. B. 95.
(3) [1907] 1 K. B. 47.

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the facts stated in paragraphs 3 to 8 inclusive, that the contention of the respondents was correct, and they decided that the assessment made upon them ought to be reduced, and they reduced the same by the sum of 1200*l.*, namely, one-third of the sum of 3600*l.*, accordingly.

Sir S. T. Evans, S.-G., and *W. Finlay*, for the appellant. The compensation charge is by s. 3, sub-s. 1, of the Licensing Act, 1904, made payable in respect of all existing on licences, and varies according to the annual value of the licensed premises. By sub-s. 2 it is to be paid by the licence-holder with and as part of the excise licence duty, but by sub-s. 3 he may deduct a proportionate part thereof, according to the length of his term, from the rent payable to his landlord. It is in truth a charge imposed both on the landlord and on the tenant in respect of their interests in the licensed premises. It is not an expense which can be deducted in estimating the profits and gains of the trade carried on by the respondents under Sched. D of the Income Tax Acts. The respondents occupy two distinct positions. They carry on the trade of brewers, and they are also the landlords of a number of licensed houses. The brewery business is carried on at a particular place, and the publican's business is carried on at another place, namely, at the licensed premises. The trade of a brewer is to brew and sell beer, and when he has sold and delivered it to the publican his trade ends, and it is then the trade of the publican to sell the beer by retail at the licensed house to the public. The two trades are wholly independent: *Watney & Co.* v. *Musgrave* (1); *Brickwood & Co.* v. *Reynolds.* (2) A tied licensed house is merely a valuable adjunct to the brewery and forms an outlet for the sale of beer, the expense of which is not an expense incurred for the purpose of the trade of the brewery and cannot be deducted. A disbursement to be allowed under s. 100, Sched. D, case 1, rr. 1 and 3, and cases 1 and 2, r. 1, must be one which is really incidental to the trade itself—per Lord Loreburn L.C. in *Strong & Co.* v. *Woodifield* (3)—or which is made for the purpose

(1) 5 Ex. D. 241, at p. 246. (2) [1898] 1 Q. B. 95, at p. 102.
(3) [1906] A. C. 448, at p. 452.

of enabling a person to carry on and earn profits in the trade: per Lord Davey. (1) The compensation charge is no part of the expense of carrying on the trade of the brewery.

[CHANNELL J. If a brewery company receives less rent than it pays for a public-house, of which it is a tenant and which it underlets, because the undertenant is bound to buy all his beer from the company, is not the difference in rent an expense of the trade of the brewery in the sale of the beer, and can it not be deducted as such in estimating the profits and gains of that trade?]

No; it is not an expense of carrying on the trade of the brewery. It cannot be deducted any more than a loan by a brewery company to the tenant of a free house in order to secure his custom can be deducted, or than the premiums paid on the purchase of licensed houses can be deducted: *Watney & Co.* v. *Musgrave.* (2) The compensation charge is a charge upon the licence of the public-house, and not upon the profits of the brewery, and it is borne by the landlord and the tenant of the house in proportion to their respective interests in the house. The landlord's share is imposed upon him as landlord of the house and not as brewer, and it is paid into the compensation fund as an insurance against loss to both landlord and tenant if the licence is taken away from any cause not attributable to the misconduct of the licence-holder. The amount of the charge depends upon the annual value of the house, and it goes towards an insurance fund against possible loss to the landlord, whether he is a brewer or not, and the tenant. When the tenant deducts the landlord's share from the rent, it is merely a statutory right of recoupment and does not lessen the rent payable so as to affect the income tax thereon under Sched. A of the Income Tax Acts: *Hancock & Co.* v. *Gillard.* (3) The charge is payable whether the landlord is a brewer or not; and the tenant has a right as against his landlord as landlord, and not as brewer, to deduct the landlord's share from the rent. The compensation charge is an expense of carrying on the business of the licensed house. The statement in paragraph 3 of the case that the licensed

(1) [1906] A. C. 448, at p. 453. (2) 5 Ex. D. 241.
(3) [1907] 1 K. B. 47.

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premises were employed by the respondents as substantially part of their plant or outfit necessary to carry on their business profitably merely means that they impose a tie on their tenants for the purpose of selling their beer, and therefore the facts are the same as in the case of all brewery companies who own tied houses. Even, however, if the respondents' share of the compensation charge can be said to be an expense of their trade as brewers, it is not a sum "wholly and exclusively laid out or expended for the purposes of such trade," namely, the trade of the brewery, within cases 1 and 2, r. 1, of Sched. D. By s. 159 of the Income Tax Act, 1845, no deduction other than those expressly mentioned in the Act is allowable. The decision therefore was wrong.

Danckwerts, *K.C.*, and *Leslie Scott*, for the respondents. The trade of a brewer is to make and sell beer, and he makes profits not simply by brewing beer, but by selling it. If an annual expense is necessarily incurred in order to earn the profits in the trade, that is an expense which can be deducted in estimating the profits and gains of the trade under Sched. D. The owner of a brewery, in order to carry on his trade of selling beer and so to make profits, which are assessable to income tax, has to acquire tied licensed houses. The Commissioners have found that the respondents became the owners of the tied houses as part of their business and as a necessary incident of the profitable carrying on of their business, and that the tied houses were employed by them as substantially part of their plant or outfit necessary to carry on the business profitably. The respondents are therefore compelled to own these tied houses in order to sell their beer and earn their profits. The licences of these tied houses are subject to a tax or charge for the compensation fund under the Licensing Act, 1904, and the respondents as owners of these houses have to pay a part of that tax or charge, and therefore can deduct the amount so paid as an expense of carrying on their business. It is similar to the expense of keeping horses for delivering beer to their customers, without which the business could not be profitably carried on. The expense of a depot owned by a brewery company for the sale of their beer can be deducted. This compensation charge

is in the nature of a compulsory insurance against loss and is an expense necessarily incurred in carrying on the business. The reasoning of the judges who decided *Watney & Co.* v. *Musgrave* (1) cannot be supported and has always been rejected since that time. The real decision in that case was that the expenditure was a capital expenditure and therefore could not be deducted. In *Strong & Co.* v. *Woodifield* (2), Lord Davey said that the payment of the damages which it was sought to deduct in that case "was not money expended 'for the purpose of the trade.' These words are used in other rules, and appear to me to mean for the purpose of enabling a person to carry on and earn profits in the trade." The findings of fact in the present case bring it within that proposition.

The decision in *Brickwood & Co.* v. *Reynolds* (3) went upon the ground that the proper deduction for repairs had already been allowed under Sched. A and that no further sum for repairs could be brought into the account, and that the extra amount expended on repairs was voluntarily incurred by the brewery company for the purpose of securing good tenants. The compensation charge, on the other hand, is necessarily incurred for the purpose of carrying on the trade of the brewery. It has nothing to do with the rent of the licensed house: *Hancock & Co.* v. *Gillard* (4); *Waddle* v. *Sunderland Union* (5); and it is a charge which is imposed upon the respondents solely owing to the necessity of their having these tied houses for the purpose of selling their beer, and it is therefore an expense incurred exclusively for the purposes of their trade as brewers, and as such it is the subject of deduction: *Reid's Brewery Co.* v. *Male.* (6) The decision of the Commissioners was therefore right.

W. Finlay, in reply, referred to *Southwell* v. *Savill Brothers, Ld.* (7)

CHANNELL J. This case, to my mind, when carefully examined, becomes fairly clear. A brewer's business, as has been pointed

(1) 5 Ex. D. 241.
(2) [1906] A. C. 448, at p. 453.
(3) [1898] 1 Q. B. 95.
(4) [1907] 1 K. B. 47.
(5) [1908] 1 K. B. 642.
(6) [1891] 2 Q. B. 1.
(7) [1901] 2 K. B. 349.

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out in argument, is not merely to brew beer, but also to sell it, and his profits are mainly, if not almost entirely, made from the sale of the beer. Those expenses which are both necessary and exclusively incurred for the purpose of selling the beer can undoubtedly be deducted in arriving at the annual profits and gains of the business. If a brewer establishes a depot at a distance from his brewery for the purpose of increasing the sale of his beer, the annual expense of maintaining that depot is, in my opinion, clearly an expense which can be deducted, as being exclusively laid out for the purpose of the trade of selling beer. The cost of purchasing or building, if he does purchase or build, the depot could not be deducted, not because it is not exclusively laid out for the purpose of the trade, but because it is a capital expenditure and not an annual expense of the trade, So also if, in order to sell his beer, he has to employ an agent exclusively for that purpose, and has to pay the agent, that expense may also, in my opinion, be deducted in estimating the annual profits and gains of the trade. Upon the same principle it seems to me that if a brewer by the now familiar process of having tied houses sells his beer, and if the annual expense of having those tied houses for that purpose can be arrived at, that is an annual expense of the trade incurred for the purpose of selling the beer, similar to the annual expense of a depot or an agent; and I see no reason to doubt that that expense might be, and upon the facts as stated in the present case in my opinion would be, incurred exclusively for the purpose of selling the beer, and, if so, it might be deducted in arriving at the annual profits of the trade. That seems to me, as at present advised, to be correct, and I do not know of any authority which is opposed to that view. There are, no doubt, some observations in the judgment of both the learned judges, and particularly of Kelly C.B. in *Watney & Co.* v. *Musgrave* (1) which are inconsistent with the above view, but those observations were in no way material to the decision of the Court, and such observations ought always, in fairness to the judges, to be interpreted with regard to the facts of the case before the Court. The decision in that case was beyond question right,

(1) 5 Ex. D. 241.

because the expenditure sought to be deducted was in the nature of capital expenditure, and therefore the point which I am considering did not arise. The next case to which it is necessary to refer is *Brickwood & Co.* v. *Reynolds*. (1) There were two grounds for the decision in that case. The second ground I will deal with later on when I come to deal more particularly with the compensation charge. The first ground is quite consistent with what I am now saying. The question arose as to the repairs of tied houses let to tenants. Repairs come into the income tax account under Sched. A as well as under Sched. D. The annual value of premises under Sched. A, where the premises are let to a tenant and the landlord undertakes the repairs, is arrived at by deducting one-sixth from the amount of the assessment, and this is allowed by s. 35 of the Finance Act, 1894. In *Brickwood & Co.* v. *Reynolds* (1) payments were made by the brewery company for repairs of the tied houses let by them to tenants in excess of that allowance, and the company claimed to have that extra amount allowed to them as a deduction before arriving at the balance of the profits and gains of their trade under Sched. D. The ground upon which it was put was that the object of the repairs was to increase the profits of their trade. The Court of Appeal refused to sanction the deduction. They held that the deduction could not be allowed, as the houses were not occupied by the company for the purposes of their trade, but were occupied by the tenants, an allowance for repairs having already been made to the company under Sched. A as between them and the Crown. That is perfectly clear and does not militate in any way against the view that I am now suggesting. It seems to me that whatever can properly be attributed to the annual expense of selling the beer by means of tied houses ought to be deducted before arriving at the balance of the profits and gains of the trade of the brewer. In view of the conclusion at which I have arrived upon the particular question of the compensation charge, and which I shall come to later on, it does not seem to me to be necessary to express an opinion upon this point, but as it has been so fully argued I think it right to state that my present view is that above indicated.

(1) [1898] 1 Q. B. 95.

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I now come to the question whether this compensation charge, which is made in respect of a tied licensed house, can be considered as an annual expense incurred by the brewer for the purpose of selling his beer in that licensed house. The brewer sells, say, 100 barrels of beer at a wholesale price to the tenant of the licensed house. His object is to secure that customer and to sell the beer, and, as I have already said, in so far as he incurs an annual expense in order to sell those 100 barrels of beer, I think that he is entitled to deduct it. The tenant of the house sells the beer by retail, and he probably sells spirits and other things as well. His trade is a different trade from the trade of the brewer. The larger his trade is, the more beer he will probably buy from the brewer, so that the one trade to a certain extent depends upon the other. But they are not the same trade. The payment of the compensation charge is a payment for the purpose of providing a fund for compensating those persons who are interested in any licence which is taken away. The charge is imposed upon those licences which are not taken away, according to the annual value of the licensed premises, and the charges so imposed are paid to a separate account and constitute the compensation fund. The sums paid into that fund are in the nature of an insurance, and the obligation to pay the charge is a statutory obligation imposed both upon the landlord and the tenant of the licensed premises. No doubt the landlord's share is collected from the tenant, but still, so far as the landlord's share is concerned, it is a charge imposed upon the landlord. The reasoning of Bigham J. in *Hancock & Co.* v. *Gillard* (1) shews that the deduction of the landlord's share of the charge from the rent does not alter the amount of the rent payable by the tenant to the landlord. The tenant has to pay the whole charge in the first instance, and, having done so, he is given a convenient machinery for repaying himself the sum which the landlord owes to him in respect of the charge by deducting that sum from the rent. That is a matter of account between them, and the statute has given to the tenant a right of set-off, but the charge is not a charge upon the rent. It is a statutory charge upon the landlord as the landlord of a

(1) [1907] 1 K. B. 47.

licensed house, and the amount of the charge depends upon his interest in the licensed house; in other words, it depends upon his probable loss if the licence is taken away, because in that event the annual value of the house will be diminished. Therefore both the landlord and the tenant have an interest in the licence, the proportion of the interest of each depending upon the length of the term. The charge is an insurance, so far as it can properly be called an insurance, of the trade which is carried on in the house, namely, the tenant's trade and not the landlord's. The tenant's trade, as I have said, is a different trade from the landlord's, though the latter depends to a certain extent upon the former.

Under these circumstances I have to consider the application of the provisions of the Income Tax Acts. Although, as a proportion of the charge is imposed upon the brewery company by reason of their having assumed, for the purposes of their trade, the position of landlords of a licensed house, it looks prima facie as if it was an expense incurred in the carrying on of their trade, and as such allowable as a deduction under the Acts, because, as I have already said, I think that the annual expense which a brewer incurs by becoming the owner of a licensed house for the purpose of selling his beer there is an annual expense of his trade, and therefore ought to be deducted in estimating the balance of the profits and gains of the trade, yet that is not really so, because the payment is made for the purpose of insuring against the loss of the tenant's trade, in which the brewery company are only indirectly interested. Can it be said in those circumstances that the compensation charge is money "wholly and exclusively laid out or expended for the purposes of" the company's trade within the meaning of cases 1 and 2, r. 1, of s. 100 of the Income Tax Act, 1842? Looking at the second ground of the decision in *Brickwood & Co.* v. *Reynolds* (1)—and as it was put forward by the Court as one of the grounds of the decision it is an authority upon the point—it seems to me that an expense that is incurred for the purpose of insuring against the loss of the tenant's retail trade at the licensed house, though that loss

(1) [1898] 1 Q. B. 95.

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would indirectly affect the wholesale trade of the brewery company, cannot be said to be an expense wholly and exclusively incurred for the purposes of the company's trade.

Upon these grounds I have come to the conclusion, though not without doubt, that the defendants are not entitled to the deduction claimed. My doubt is occasioned by the fact that the counsel for the Crown would not admit the proposition, which seems to me to be clear, as to the right to deduct the annual expense incurred by a brewery company of having tied houses for the purpose of selling their beer, and in consequence I thought at first that the argument in the present case necessarily depended upon it. No doubt they would not admit the truth of that proposition in view of other cases which may arise. But I do not think that the contention of the Crown in the present case necessarily depends upon it at all, because I have come to the conclusion that, though the annual expense of having tied houses might be allowable as a deduction, the company's share of this particular charge cannot be considered as an expense which is allowable by way of a deduction, inasmuch as it cannot be said to be wholly and exclusively incurred for the purposes of the brewery company's trade. There must therefore be judgment for the Crown.

Appeal allowed.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitors for respondents: *Godden, Son & Holme.*

W. F. B.

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Revenue—Succession Duty—Annuity payable to Trustee of Settlement—New Trustee appointed on Death of former Trustee—"Substitutive Limitation"—Succession Duty Act, 1853 (16 & 17 *Vict. c.* 51), *s.* 2—*Estate Duty—Property passing on Death—Exception—Interest as "holder of an office"—Trustee—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*b*).

By an indenture property was settled upon three named trustees upon trust that they and the survivors and survivor, and the executors and administrators of such survivor, or other the trustees or trustee for the time being of the settlement (thereinafter called "the trustees or trustee"), should, so far as material, pay "an annual sum of 200*l.* each to the trustees or trustee while acting in the trusts by way of remuneration for their services, and in addition to any payments for professional services," and subject thereto upon trust to pay the income of the property according to the direction of the settlor during her life, with remainders over. The settlor during her life had power to appoint a new trustee or new trustees for the purposes of the trust. One of the original trustees died, having received the annual sum of 200*l.* up to the date of his death, and the settlor appointed a new trustee in his place. The Crown claimed succession duty upon the annual sum of 200*l.* to which the new trustee became entitled upon his appointment, and also estate duty and settlement estate duty upon the principal value of the capital fund yielding the annual sum of 200*l.*:—

Held—(1.) that the new trustee did not become entitled to the annual sum of 200*l.* by reason of the settlement upon the death of the former trustee within the meaning of s. 2 of the Succession Duty Act, 1853, but by reason of the settlement coupled with the vacancy and his appointment as trustee, and that succession duty was not payable; and (2.) that the interest which the deceased trustee had in the property was an interest only as holder of an office, namely, the office of trustee, within the exception in s. 2, sub-s. 1 (*b*), of the Finance Act, 1894, and that estate duty and settlement estate duty were not payable.

INFORMATION by the Attorney-General claiming succession duty and estate duty and settlement estate duty, the defendants being Caroline Isabel Eyres, Bolton James Alfred Monsell, and Frederick Charles Marshall.

1. By an indenture dated April 6, 1903, and made between Caroline Mary Sybil Eyres, spinster (thereinafter called "the settlor"), of the one part, and the defendant Caroline Isabel Eyres, widow, Arthur Henry Sharp, and Sir John Fowke Lancelot Rolleston (thereinafter called "the original trustees")

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of the other part; reciting that the settlor was desirous of making a settlement and had caused to be transferred into the names of the original trustees the investments mentioned in the schedule to the now stating indenture; and reciting that by an indenture thereinafter called the New River settlement of even date with and between the same parties as the now stating indenture the settlor had conveyed a share in the New River Company to the original trustees in fee simple upon trust for sale and to stand possessed of the proceeds of sale and of the rents and profits until sale upon the trusts declared by the now stating indenture; it was witnessed that the settlor directed and the original trustees agreed that the original trustees should stand possessed of the net money to arise from any sale under the trusts for sale contained in the New River settlement and of the investments mentioned in the schedule to the now stating indenture, upon trust that they and the survivors and survivor and the executors or administrators of such survivor or other the trustees or trustee for the time being of the now stating indenture (thereinafter called "the trustees or trustee") should either permit the investments mentioned in the schedule to remain in their present state of investment or should with such consent and discretion as therein mentioned convert the same and invest the proceeds as therein mentioned; and it was thereby declared that the trustees or trustee should stand possessed of the said investments (thereinafter called "the trust fund") and of the annual income thereof upon trust to pay the annual sums following (that is to say) an annual sum of 200*l.* each to the trustees or trustee while acting in the trusts by way of remuneration for their services and in addition to any payments for professional services, and to the defendant Caroline Isabel Eyres an annuity of 5000*l.* during her life, and to Samuel Eyres Wilson an annuity of 2000*l.* during his life, and after his decease if his wife Mary Eyres Wilson should survive him a like annuity to her for the remainder of her life, and to Helen Elizabeth Drummond Baker an annuity of 60*l.* during her life, such annuities respectively to be considered as accruing from day to day, but to be paid by equal half-yearly payments on January 1 and July 1 in each year, the first

payment of the annuities given to the trustees or trustee and to Caroline Isabel Eyres and Samuel Eyres Wilson and Helen Elizabeth Drummond Baker to be made as upon the 1st day of July, 1903, and the first (apportioned) payment of the annuity to Mary Eyres Wilson on the first half-yearly day after her husband's death; and, subject to the annuities, the trust fund and the annual produce thereof were to be held by the trustees upon such trusts as the settlor should, while not under coverture by deed or whether covert or sole by will or codicil, appoint, and in default of appointment upon trust to pay the income of the trust fund to or according to the direction of the settlor during her life, and subject thereto as to the trust fund and income thereof in trust for the issue by any marriage of the settlor as the settlor should by deed or will appoint (but so that the interests of children should not vest before attaining twenty-one, or if female marriage), and subject to any such appointment in trust for such of her children as should attain twenty-one or being female marry under that age in equal shares. And the now stating indenture contained a power of appointment to the settlor for the benefit of any husband who might survive her over the annual income of the trust fund; and it was declared that (subject as aforesaid) if no child of the settlor should attain a vested interest the trust fund should be held in trust as the settlor should by deed or will appoint, and in default of appointment upon trust as to two-thirds for the defendant Caroline Isabel Eyres, and as to the remaining one-third upon trust for the said Arthur Henry Sharp; and it was declared that the trustees might employ professional auditors and pay the expenses of such audit out of capital or income, and that any trustee in the conduct of the trust business might instead of acting personally employ and pay an agent, whether being a solicitor or any other person, to transact all business and do all acts required to be done in the trust, including the receipt and payment of money, and that any trustee engaged in any profession or business should be entitled to be paid all usual professional charges for business transacted and acts done by him or any partner of his in connection with the trusts thereof, including acts which a trustee not being in any profession or business could have done personally;

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and it was declared that the settlor during her life should have power to appoint a new trustee or new trustees for the purposes of the trust thereby declared. The schedule to the now stating indenture contained particulars of (part 1) mortgage securities and (part 2) Government, railway, and corporation investments.

2. The trusts of the settlement took effect and have been executed by the trustees up to the present time. The settlor, Caroline Mary Sybil Eyres, on or about December 1, 1904, married Bolton Meredith Monsell, and is still living.

3. On December 2, 1904, Sir Jacob Wilson was duly appointed a trustee of the settlement of April 6, 1903, in place of Sir John Fowke Lancelot Rolleston, who retired from the trust.

4. On February 15, 1905, Arthur Henry Sharp, one of the original trustees of the settlement, died, having received the annual sum of 200*l.* given to him by the settlement up to the date of his death, and on June 22, 1905, his will was proved in the principal registry, but the affidavit and annexed statements on which probate of his will was obtained do not contain any reference to the annual sum of 200*l.* payable to the deceased under the settlement of April 6, 1903, nor is any apportioned income due to the estate of the deceased in respect of the annual income brought into account.

5. The defendant Bolton James Alfred Monsell was (on May 22, 1905) duly appointed by the settlor to be a trustee of the settlement in place of Arthur Henry Sharp, deceased.

6. On July 11, 1905, Sir Jacob Wilson died, having received the annual sum of 200*l.* payable to him as a trustee of the settlement up to the date of his death. On November 2, 1905, his will was proved in the principal registry, but the schedules to the affidavit on which probate of his will was obtained do not contain any reference to the 200*l.* a year as property passing on his death.

7. The defendant Frederick Charles Marshall was (on November 14, 1905) duly appointed by the settlor to be a trustee of the settlement of April 6, 1903, in place of Sir Jacob Wilson, deceased.

8. Under these circumstances succession duty under 16 & 17

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Vict. c. 51 (1) on the annual sums of 200*l.* to which the defendants Bolton James Alfred Monsell and Frederick Charles Marshall respectively succeeded in possession under the settlement on their appointments as trustees thereof after the deaths of Arthur Henry Sharp and Sir Jacob Wilson respectively, and also estate duty and settlement estate duty under the Finance Act, 1894 (2), upon the principal value of the capital funds yielding the said annual sums of 200*l.*, have become payable to the Commissioners of Inland Revenue on behalf of His Majesty. The Commissioners accordingly have caused application to be made to the defendants for accounts and payment of such duties, but the defendants refuse to pay any of such duties and contend that no such duties or any of them are or is payable.

The Attorney-General, on behalf of His Majesty, prayed that it might be declared that on the respective appointments of the defendants Bolton James Alfred Monsell and Frederick Charles Marshall to be trustees of the settlement of April 6, 1903, succession duty under 16 & 17 Vict. c. 51 became payable (by four yearly instalments) on the annual sums of 200*l.* to which

(1) Succession Duty Act, 1853 (16 & 17 Vict. c. 51), s. 2: "Every past or future disposition of property, by reason whereof any person has or shall become beneficially entitled to any property or the income thereof upon the death of any person dying after the time appointed for the commencement of this Act, either immediately or after any interval, either certainly or contingently, and either originally or by way of substitutive limitation, and every devolution by law of any beneficial interest in property, or the income thereof, upon the death of any person dying after the time appointed for the commencement of this Act, to any other person, in possession or expectancy, shall be deemed to have conferred or to confer on the person entitled by reason of any such disposition or devolution a 'succession' and the term 'successor' shall denote the person so entitled; and the term 'predecessor' shall denote the settlor, disponer, testator, obligor, ancestor, or other person from whom the interest of the successor is or shall be derived."

(2) Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2, sub-s. 1: "Property passing on the death of the deceased shall be deemed to include the property following, that is to say:— . . . . (*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest; but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole."

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the said defendants succeeded in possession under the trusts of the settlement, and that on the deaths of Arthur Henry Sharp and Sir Jacob Wilson respectively estate duty and settlement estate duty became payable under the provisions of the Finance Act, 1894, in respect of the principal values of the capital funds producing the said annual sums of 200*l.* as property passing on their deaths.

Paragraph 1 of the answer of the defendants was as follows:—

1. In the year 1903 Caroline Mary Sybil Eyres, spinster, in the information mentioned, being entitled to property of large value, executed three settlements (all dated April 6, 1903). It was the intention of Caroline Mary Sybil Eyres that the trustees of the settlements should always be the same persons, and effect has throughout been given to this intention. Caroline Mary Sybil Eyres anticipated that the work which the trustees of the settlements would be personally called upon to do in connection with the settlements would be of considerable amount (as in fact has been the case), and she determined to attach a yearly remuneration to the office of trustee. The provision for the payment of an annuity of 200*l.* to each of the trustees was accordingly inserted in the indenture of April 6, 1903, mentioned in paragraph 1 of the information, this being the most convenient method of providing for the remuneration. The interest of each of the trustees in the property settled by the indenture was throughout and is an interest only as holder of an office (namely, the office of trustee of the settlement) within the meaning of s. 2, sub-s. 1 (*b*), of the Finance Act, 1894. Moreover, the work which was undertaken by each trustee upon accepting the office of trustee constituted full consideration in money's worth for the grant to such trustee of the aforesaid annuity.

The remaining paragraphs of the answer contained (so far as material) admissions of the facts stated in the information.

Sir W. S. Robson, *A.-G.*, and *Sargant*, for the Crown. Succession duty became payable in respect of the two annuities of 200*l.* each upon the appointment of the two new trustees in

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the place of the two who died. There was a "succession" within the meaning of s. 2 of the Succession Duty Act, 1853, so as to entitle the Crown to succession duty under s. 10. The language of s. 2 is very wide and covers the present case. The settlement was a disposition of property by reason whereof the new trustees became entitled, upon the death of the former trustees, though after an interval, to the annuities. Sects. 12 and 17 allow certain exceptions. For instance, a successor is not, as a general rule, chargeable with duty upon a succession taken under a disposition made by himself, and a policy of life insurance is not to create the relation of predecessor and successor between the insurers and the assured. Every disposition other than those expressly excepted comes within s. 2. The new trustees here succeeded to a trust to which an annuity of 200*l.* each was attached by the settlement. If this annuity had been given by will legacy duty would have been payable: *In re Thorley, Thorley* v. *Massam.* (1) A trustee who is remunerated for his services as trustee is a beneficiary under the settlement to the extent of his remuneration. *Attorney-General* v. *Gell* (2) is in point. In that case there was an interval of time before the succession took place, and it was held that succession duty was payable. The only difference between the two cases is that here the new trustee has to be appointed by the settlor, and upon her death by the surviving or continuing trustees under s. 10 of the Trustee Act, 1893 (56 & 57 Vict. c. 53). But when the settlor or other person who has to make the appointment has made the selection of a new trustee and appointed him, that appointment must be read into the settlement as if the name of the new trustee had been written in there as being the trustee named in succession to or in substitution for the original trustee. Under s. 2 the successor may be entitled "either originally or by way of substitutive limitation," and those latter words cover this case. *Attorney-General* v. *Gell* (2) was followed in *Ring* v. *Jarman.* (3) The trustee named in the settlement being a beneficiary thereunder, the new trustee takes the same beneficial interest in the annuity as the deceased trustee took, and there was therefore a succession under

(1) [1891] 2 Ch. 613. (2) (1865) 3 H. & C. 615.
(3) (1872) L. R. 14 Eq. 357.

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s. 2 of the Act in respect of the annuities, there being a disposition of property by reason whereof the new trustees became beneficially entitled after an interval to the annuities upon the occasion of the death of the former trustees, and succession duty is payable.

Secondly, estate duty is payable (1) under ss. 1 and 2 of the Finance Act, 1894, in respect of these two annuities. Each of the deceased trustees had an interest in the property to the extent of his annuity, which interest ceased on his death, and a benefit accrued or arose either to each of the new trustees or to the settlor by the cesser of such interest. The case clearly comes within the general words of s. 2, sub-s. 1 (*b*), of the Finance Act, 1894, unless it can be brought within the exception in that sub-section as being property the interest in which of the deceased was only an interest as holder of an office. A trustee does not hold an "office." In Bacon's Abridgement, 7th ed. vol. 6, p. 2, title "Offices and Officers," the nature of an office and the several kinds of offices are discussed, but it is nowhere said that a trust is an office. The Public Trustee Act, 1906 (6 Edw. 7, c. 55), s. 1, created "the office of public trustee," and it made him a corporation sole with perpetual succession, but that is quite a different position from that of an ordinary trustee. An office is one in which there is a successor and to which remuneration naturally attaches. No remuneration attaches to the position of trustee, unless it is expressly provided for by the instrument creating the trust. But if a trustee can be said to hold an office, the interest of the deceased trustees in the annuities was not "only" an interest as holders of an office so as to come within the exception in s. 2, sub-s. 1 (*b*), of the Finance Act, 1894. Each trustee became entitled to his remuneration as a beneficiary under the settlement; he became entitled to it by being appointed a trustee coupled with the fact that the settlement provided a benefit for him so long as he acted as trustee. The exception in s. 2, sub-s. 1 (*b*), therefore does not apply, and estate duty and settlement estate duty are also payable. [They also referred to *Williams* v. *Blakeley*. (2)]

(1) It was admitted that, if estate duty was payable, settlement estate duty was also payable under s. 5 of the Finance Act, 1894.

(2) (1902) 88 L. T. 231

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Danckwerts, K.C., and *Austen-Cartmell*, for the defendants. First, with regard to succession duty, the annuity is given to each of the trustees of the settlement while acting in the trusts by way of remuneration for his services. Each trustee is only entitled to his remuneration if and so long as he acts as trustee. Upon a trustee's death the person entitled to the income of the property gets the benefit of the cesser of the annuity either until a new trustee is appointed, or absolutely if a new trustee is not appointed, a course which is authorized by s. 10, sub-s. 2 (*c*), of the Trustee Act, 1893, there being two trustees left to perform the trust. The new trustee is only entitled to the annuity by virtue of the settlement and his appointment as trustee and from the time of his appointment. He does not take the same annuity as the deceased trustee had, though he receives the same annual sum. By s. 10, sub-s. 2 (*a*), of the Trustee Act, 1893, the number of trustees may upon the appointment of a new trustee be increased, and if that were done it would be impossible to say that any particular one of the new trustees took the same annuity as the deceased or retiring trustee had. If there is a succession at all, it can only be as between the deceased trustee and the tenant for life under s. 5 of the Succession Duty Act, 1853, and in that case s. 12 prevents succession duty being payable. The remuneration of the trustees may be looked upon as part of the expenses of managing the property, like an agent's expenses, and it could not be contended that the new agent succeeded to the remuneration of the former agent so as to make succession duty payable. Nor is the limitation a "substitutive limitation" within the meaning of s. 2. To come within those words there must be a substitutive limitation in respect of the same thing; and it must be a limitation substituted by the settlement. The doctrine as to the exercise of powers of appointment relating back to the instrument conferring the power does not apply to the appointment of new trustees. The names of the new trustees are not to be taken as if they had been written in the settlement. If in this case their names had been so written in, it might be, if the settlement used words to that effect, a successive limitation, but not a substitutive one. Succession duty therefore is not payable in respect of these

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annuities. [They referred to *Fryer* v. *Morland* (1); *Duke of Northumberland* v. *Attorney-General.* (2)]

Next, with regard to estate duty, a benefit accrued or arose on the death of the trustees by the cesser of the annuities, and estate duty and succession estate duty would be payable as in *Lord Advocate* v. *Maclachlan* (3) and *In re Dixon, Penfold* v. *Dixon* (4), were it not for the exception in s. 2, sub-s. 1 (*b*), of the Finance Act, 1894, of an interest in the property which the deceased had as holder of an office. This is a clause in a taxing Act containing an exception in favour of a subject, and it must be construed strictly against the Crown. A trusteeship is an "office," and the deceased trustees' interest only endured so long as they held that office. The office need not be one in which there is a successor and to which a salary is attached. A trusteeship is an office for life, the trustee being irremovable except for misconduct, and comes within the description of offices given in Blackstone's Commentaries, 21st ed. vol. 2, p. 36. In Williams on Executors, 10th ed. vol. 1, p. 157, an executorship is called an office; in *In re Thorley, Thorley* v. *Massam* (5) North J. speaks of "an executor's office"; and in *In re Willey* (6) Cotton L.J. spoke of the office of executor and that of trustee. Lewin on Trusts, 11th ed. pp. 276, 277, speaks of "the office of trustee." The definition of "trust" in s. 50 of the Trustee Act, 1893, which is taken from s. 2 of the Trustee Act, 1850 (13 & 14 Vict. c. 60), says that the expression "trust" in that Act includes "the duties incident to the office of personal representative of a deceased person"; and s. 4, sub-s. 7, of the Judicial Trustees Act, 1896 (59 & 60 Vict. c. 35), speaks of "the office" of a judicial trustee, the latter being in truth in the same position as an ordinary trustee. The exception therefore applies, and estate duty is not payable. [They also referred to *In re Sherwood.* (7)]

Sargant, in reply. In order to make succession duty payable the annuity need not be the same annuity. The new trustees

(1) (1876) 3 Ch. D. 675.
(2) [1905] A. C. 406.
(3) (1899) 1 F. 917; [1900] W. N. 204.
(4) [1902] 1 Ch. 248.
(5) [1891] 2 Ch. 613, at p. 620.
(6) [1890] W. N. 1.
(7) (1840) 3 Beav. 338.

have become entitled, after an interval, to an annuity of 200*l.* each out of the corpus of the property upon the death of the former trustees. As to the claim for estate duty, *In re Thorley, Thorley* v. *Massam* (1) shews that, even if a trustee holds an office, the trustees in the present case have a double interest, one as trustees and the other as beneficiaries under the settlement in respect of the 200*l.* a year. It cannot be said that their interest was only an interest as holders of an office.

CHANNELL J. In my opinion the Crown has failed to make out the right to the duties claimed. I will deal first with the claim to recover succession duty. The ground upon which I think that that claim fails is that the property to which the new trustee became entitled upon his appointment, namely, the annuity of 200*l.* for his services as trustee, and which he was only to have while he acted as trustee, was not property which came to him by reason of the settlement upon the death of any person. It came to him upon his appointment as trustee under the settlement; that was the immediate cause. And if the causa sine qua non is to be looked at, the annuity came to him under the settlement by reason of the vacancy in the trusteeship and his appointment to fill that vacancy. That vacancy might have arisen by resignation, or by death, or by the trustee being removed. A vacancy in this very trust did indeed arise by resignation; and it was a mere accident that the vacancy in these two cases arose through death. The settlement does not provide for the annuity to the trustees lasting during their respective lives; it is only given to each of the trustees while acting in the trusts by way of remuneration for his services. Nor does the settlement draw any distinction between a trustee who succeeds to a trustee who dies and a trustee who succeeds to one who resigns. The death had really only a remote and accidental connection with the matter; it was the vacancy in the trusteeship and the appointment of the particular individual to fill that vacancy which, coupled with the provision in the settlement, gave the annuity to the person so appointed, so that

(1) [1891] 2 Ch. 613.

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in no sense does it seem to me that the right to the annuity depends upon the death of the trustee.

The new trustee certainly did not succeed immediately upon the death of the former trustee, but then s. 2 of the Succession Duty Act, 1853, says that the succession may be "either immediately or after any interval." In the present case there was an interval of time; but there was something more. Those words seem to me to mean that though there may be an interval of time, yet the death must give rise to the right of the person entitled in possession to the property. In the case of *Attorney-General* v. *Gell* (1) there was an interval of time during which the income of the property was to be accumulated—an interval after the death which gave the right to the property—and therefore the person who became entitled did not enter into the immediate enjoyment of the property. But it was the death which gave rise to the right, whereas in the present case the death did not give rise to the right to the annuity at all. Accordingly I do not think that there would be any real difficulty in this case if it were not for the words in s. 2 "either originally or by way of substitutive limitation." If the settlement had said in terms that, upon the death of one of the trustees named therein, Mr. Monsell was to take his place as trustee, there would be some colour for the view that the settlement had expressly provided that upon the death of the trustee originally named Mr. Monsell was to become entitled to the annuity of 200*l.* as trustee, and there would have been something to be said in support of the contention that there had been a succession. If the words "or by way of substitutive limitation" can be taken to mean that the appointment of Mr. Monsell is to be read into the settlement as if it were originally there in the way I have just stated, then no doubt the effect would be the same as if it had actually been written into the settlement. I do not think that that is the meaning of the words "substitutive limitation." They seem to me to mean a limitation in the settlement which is to take effect by virtue of the settlement in place of the original limitation therein. It means a limitation substituted by virtue of the settlement for that originally created.

(1) 3 H. & C. 615.

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If that is the true meaning of the words they do not cover this case, and they do not affect my view that the right to the annuity did not arise upon the death, but by reason of the vacancy, and upon the appointment, and that it is an accident that the vacancy was created by the death. Therefore I have come to the conclusion that the right of the new trustees to the annuities of 200*l.* did not arise by reason of the disposition of the property, that is, the settlement, upon the death of any person. That being so, succession duty is not payable.

The second question is whether estate duty is payable in respect of these two annuities. That depends entirely upon whether the trusteeship is or is not an "office" within the meaning of s. 2, sub-s. 1 (*b*), of the Finance Act, 1894. A trusteeship is often spoken of popularly as an office, and not only popularly but by writers of accuracy, such as Lewin on Trusts, 11th ed. pp. 276, 277, and also by judges, as, for instance, by Cotton L.J. in *In re Willey.* (1) In my opinion that is a correct expression. The provision in s. 2 of the Finance Act, 1894, is somewhat peculiar. It deals with property passing on death. Not infrequently a person acquires a benefit upon the death of another by reason of the cesser of the interest of the deceased person, and that class of case is specially brought within the Act. In the ordinary sense that kind of property can hardly be said to pass on death, but the Legislature saw that it was of common occurrence, and so they provided for it. Sect. 2, sub-s. 1, provides that "property passing on the death of the deceased shall be deemed to include the property following, that is to say . . . . (*b*) Property in which the deceased or any other person had an interest ceasing on the death of the deceased, to the extent to which a benefit accrues or arises by the cesser of such interest." That means the benefit which a person acquires by reason of the death of some one who had an interest ceasing on his death. The sub-section then makes an exception upon that—"but exclusive of property the interest in which of the deceased or other person was only an interest as holder of an office, or recipient of the benefits of a charity, or as a corporation sole." The question is, What does the word "office" mean in that

(1) [1890] W. N. 1.

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section? I cannot help thinking that the Legislature had in their minds the case of an office in which there was an immediate successor, and did not wish to impose estate duty upon the successor as being the recipient of a benefit which came to him by reason of the death of the person who held that office. That probably led to the exception being inserted in the clause, but at the same time the words are quite general, and I do not think that I should be justified in limiting their application to the holder of an office in which there is an immediate successor who gets the benefit. In my opinion it cannot properly be said that a trusteeship is not an "office" within the meaning of the section, because there is no person immediately appointed to succeed.

There remains the point that, though the trusteeship may be said to be an office, the interest which the deceased trustee had in this annuity was an interest over and above his interest as holder of the office. The argument is that the trustee did not take the annuity only by reason of the office, but that he took it partly by reason of his being a beneficiary under the settlement and partly by reason of his being a trustee. I have felt some difficulty about that point, but I do not think that the argument is correct, because the office which the deceased trustee held was the office of trustee under this particular settlement, and that office carried with it whilst it was held an annuity of 200*l.* Therefore the property in which the deceased trustee had an interest was property in which he had an interest only by virtue of his being appointed a trustee under this settlement. Accordingly the exception in s. 2, sub-s. 1 (*b*), of the Act applies. I think that the two deceased trustees were entitled to the annuities only by reason of their being holders of an office, namely, the trusteeship under this settlement, and, that being so, the claim of the Crown to recover estate duty and settlement estate duty fails. Therefore the claim of the Crown fails upon both heads, and the information must be dismissed.

Judgment for the defendants.

Solicitor for Crown: *Solicitor of Inland Revenue.*

Solicitors for defendants: *Vincent & Vincent, for Day & Yewdall, Leeds.*

W. F. B.

COUNTY OF DURHAM ELECTRICAL POWER DISTRIBUTION COMPANY *v.* COMMISSIONERS OF INLAND REVENUE.

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Feb. 20.

Revenue—Stamp—Agreement for Sale of Goods—Price to be paid by Instalments at stated Periods—Liability to ad valorem Stamp Duty—Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *Sched. I.*

By an agreement in writing between the appellants and one of their customers the appellants agreed to supply to the customer for a period of seven years electric current for motive power, heating, and lighting purposes on the customer's premises at the rate of a penny per unit with a fixed minimum charge payable quarterly. The revenue authorities were willing for the purposes of the case to treat the document as an agreement for the sale of goods:—

Held, that the document came within the words "Bond, covenant, or instrument . . . . being the only or principal or primary security for . . . . sums of money at stated periods . . . . for a definite and certain period" in Sched. I. to the Stamp Act, 1891, and that stamp duty was payable in respect of it at the rate of 2*s.* 6*d.* per cent. on the aggregate amount of the minimum quarterly payments for seven years.

Case stated by Commissioners of Inland Revenue.

On August 3, 1907, an instrument dated August 1, 1907, was presented on behalf of the appellants to the Commissioners of Inland Revenue under the provisions of s. 12 of the Stamp Act, 1891, for their opinion as to the stamp duty with which the instrument was chargeable.

By clause 1 of the instrument the appellants were to supply and Snowball, Son & Co., Limited (thereinafter called the consumers), were to take during a term of seven years from the date of the instrument all electric current used for motive power, heating, and lighting requirements on the consumers' premises therein mentioned.

By clause 3 "the consumers shall pay to the company for all current supplied hereunder a fixed charge of 57*l.* 10*s.* per quarter and in addition the sum of one penny per Board of Trade unit for all current supplied and consumed as indicated by the company's meters."

By clause 4 "the consumers shall pay to the company the sum of 10*s.* per quarter as a rental for the said meters."

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By clause 5 the consumers were to be entitled to a supply of electric current up to the capacity of the existing installation, which was to be deemed equal to forty-six kilowatts, and clauses 6 and 7 provided for increase of quarterly payments on increase of capacity of installation, and for reduction of quarterly payments on decrease of capacity of existing installation, with a proviso that in no case should the fixed charge of 57*l.* 10*s.* be reduced below 50*l.* per quarter.

The Commissioners were prepared for the purpose of the case to hold that the instrument was an agreement or memorandum made for or relating to the sale of goods, wares, or merchandise within Exemption 3 under the head in the schedule to the Stamp Act, 1891, "Agreement or any Memorandum of an Agreement" (1), but also were of opinion as to clauses 3 and 4 thereof that it was an instrument being the only or principal or primary security for sums of money at stated periods for a definite period of seven years, so that duty was payable at the rate of 2*s.* 6*d.* per 100*l.* of the aggregate amount of the minimum quarterly payments for seven years, and they accordingly assessed it. They so assessed it by reference to the heading "Bond, Covenant, &c." (2), in Sched. I. of the said Act.

The appellants being dissatisfied with the assessment, contending that no ad valorem or other duty was payable in respect

(1) Stamp Act, 1891, Sched. I.:

"Agreement or any Memorandum of an Agreement made in England or Ireland under hand only . . . . and not otherwise specifically charged with any duty, whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument . . . . . 6*d.*

Exemptions.

(3.) Agreement, letter, or memorandum made for or relating to the sale of any goods, wares, or merchandise."

(2) "Bond, Covenant, or Instrument of any kind whatsoever.

(1) Being the only or principal or primary security for . . . . any sum or sums of money at stated periods, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack:—

For a definite and certain period, so that the total amount to be ultimately payable can be ascertained . . . } The same ad valorem duty as a bond or covenant for such total amount."

of these clauses or the other provisions of the instrument in pursuance of s. 13 of the Stamp Act, 1891, required the Commissioners to state a case.

Danckwerts, K.C., and *T. J. C. Tomlin*, for the appellants. The Commissioners have agreed, and rightly so, that for the purposes of this case the agreement shall be treated as an agreement for the sale of goods. In *British Electric Traction Co.* v. *Inland Revenue Commissioners* (1), where a traction company took a lease of a tramway from the owners and covenanted to purchase from them all the electrical energy required for the purpose of the tramway at a given rate with a specified minimum sum payable in any one year, it was held that the said minimum sum was not rent, and the instrument was not chargeable with an ad valorem duty in respect of it as such. Collins M.R. said (2): "It is not in fact rent: it is a sum payable for electric energy to be supplied just as gas, or water, or any other commodity might be supplied." And it was long ago decided that a contract for the supply of water was exempt from stamp duty as being a contract for the sale of goods: *West Middlesex Waterworks Co.* v. *Suwerkrop*. (3) Then if the agreement here is an agreement for the sale of goods it requires no stamp at all. As was laid down by Martin B., in delivering the judgment of the Court of Exchequer in *Limmer Asphalte Paving Co.* v. *Commissioners of Inland Revenue* (4), "There is no better established rule as regards stamp duty than that all that is required is that the instrument should be stamped for its leading and principal object, and that this stamp covers everything accessory to this object." Thus in *Heron* v. *Granger* (5) it was held that an agreement respecting the sale of goods was not deprived of the exemption attaching to agreements of that character by reason of the fact that it contained stipulations concerning the mode of payment and other things, the primary object being the sale of the goods. In *Southgate* v. *Bohn* (6) the defendant employed the plaintiff, an auctioneer, to sell some books for him, and, having

(1) [1902] 1 K. B. 441.
(2) Ibid. at p. 450.
(3) (1829) 4 C. & P. 87.
(4) (1872) L. R. 7 Ex. 211, at p. 217.
(5) (1805) 5 Esp. 269.
(6) (1846) 16 M. & W. 34.

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received from the plaintiff an advance of money against the amount to be realized, signed a memorandum to that effect. The books, having been sold, realized less than the advance. In an action by the plaintiff to recover the balance the memorandum was held to be admissible in evidence without a stamp, Parke B. giving as the reason for that decision that "an immediate sale of the books was the main and primary object of the parties." In *Smith* v. *Cator* (1) Abbott C.J., speaking of the exemption from stamp duty of agreements made for or relating to the sale of goods, said, "We think that description is confined to instruments whereof the sale of goods is the primary object." That, then, being the general principle of the stamp law, that you are to look at the primary purpose of the agreement and the primary purpose alone, and are to disregard any subsidiary purpose, clauses 3 and 4 ought to be treated as if they were not there, for they are purely subsidiary to the primary and leading purpose, which is that of a simple sale of goods; and, if so, this agreement is clearly not liable to any stamp at all.

Sir S. T. Evans, S.-G., and *Finlay*, for the Crown. The fact that the agreement is an agreement for the sale of goods does not necessarily render it exempt from all stamp duty. There is at the end of the schedule to the Stamp Act, 1891, a list of "General exemptions from all stamp duties." That list does not include an agreement for the sale of goods. Such an agreement is therefore not exempt from all stamp duties. The specific exemption of an agreement for the sale of goods under the heading of "Agreement or any Memorandum of an Agreement" exempts it only from the sixpenny agreement stamp where that stamp is prima facie applicable. But that heading has no application to an agreement which is "otherwise specifically charged with any duty," and the agreement in the present case is otherwise specifically so charged. It comes under the words "Bond, covenant, or instrument of any kind whatsoever, being the only or principal or primary security for . . . . any sum or sums of money at stated periods . . . for a definite and certain period, so that the total amount to be ultimately payable can be ascertained." That such an agreement

(1) (1819) 2 B. & A. 778.

as the present is a "security" within the meaning of that clause is established by the authority of the Court of Appeal and of the House of Lords in *National Telephone Co.* v. *Inland Revenue Commissioners.* (1) That case decides that an agreement may be a security for that purpose although it is not under seal, and although it is not a collateral or auxiliary obligation, but is the instrument by which the obligation to pay is originally created. There an agreement in writing for the hire by a customer of a telephone company of a private wire between his premises and the company's local exchange and the telephonic apparatus at an annual rent was held to be chargeable with an ad valorem duty as a bond, covenant, or instrument, &c.

Danckwerts, K.C., in reply. The National Telephone Company's case is distinguishable. There the agreement was solely an agreement for the hire of the telephone and wire; it was not an agreement for the sale of goods. The present contention, that where the leading and primary purpose of the instrument relates to the sale of goods the inclusion in it of other subsidiary purposes cannot bring it under any other head of charge, could not have been raised, and neither the Court of Appeal nor the House of Lords can be regarded as having expressed any opinion upon it.

CHANNELL J. In this case I have been extremely anxious to accede to Mr. Danckwerts' argument if I possibly could do so, because I have a strong impression that such a document as this was not one which the Legislature had in contemplation when they enacted the clause in the schedule under discussion. I cannot help thinking that it was put in for the purpose of taxing instruments of a totally different character. Here I think it might have been argued, though I do not pretend to know enough about the scientific aspects of the case to speak with any certainty, that this supply of electric current was rather the doing of work than the supply of goods, but, be that as it may, the case has been argued upon the footing that it is a supply of goods. If it is, then my decision will have a very curious consequence, for it will involve the conclusion that in the case of

(1) [1899] 1 Q. B. 250; [1900] A. C. 1.

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every contract in writing for the sale of goods which by the terms of the contract are to be paid for, not in one lump sum, but in instalments at future stated times, the instrument is chargeable with an ad valorem duty upon the price. My difficulty in this case is created entirely by the decisions which have already been given under the Act. I was much impressed by Mr. Danckwerts' argument, founded upon *Limmer Asphalte Paving Co.* v. *Commissioners of Inland Revenue* (1), that it is a settled principle of law that an instrument should be stamped for its leading and principal object, and that, when so stamped, the stamp appropriate to its leading and principal object covers everything accessory to that object. And if this question were now raised for the first time I should be inclined to say that you might read that doctrine into the heading in the schedule, "Agreement or any Memorandum of an Agreement," and read the words thus: "Agreement or any memorandum of an agreement . . . . under hand only and not otherwise specifically charged with any duty so far as regards its leading and principal object." I think that would be a good way of getting out of the difficulty which it seems to me there would be in applying the later clause as to periodical payments to a contract for the sale of goods. But the difficulty I have in adopting that reading is that it would conflict with decisions of the Court of Appeal and of the House of Lords in *National Telephone Co.* v. *Inland Revenue Commissioners* (2), for it certainly would have been applicable to the agreement under consideration in that case, which was practically identical with that in the present case. It is true that Mr. Danckwerts' present contention as to reading the words "leading and principal object" into the clause of the Stamp Act was not specifically raised in that case, but both tribunals distinctly decided that the instrument before them required to be stamped as a security for periodical payments. I feel a difficulty in going behind that. And I feel more difficulty in attempting to draw a distinction between the two cases, as it was suggested that I should do, because I am not satisfied with the reasoning upon which the National Telephone case proceeded. No doubt I am wrong, but I am quite unable to

(1) L. R. 7 Ex. 211. (2) [1899] 1 Q. B. 250; [1900] A. C. 1.

understand that an agreement in writing for the sale of goods is a security for the payment of the price merely because it states that the price is to be paid in a particular way. No doubt a party to an agreement feels a greater sense of security if he has got it in black and white than if it was only by word of mouth, but in no other sense can a written agreement be said to be a security for its performance. If there is a contract which must be in writing to satisfy the Statute of Frauds, no one would say that when you have got it in writing you have got a security. It is because that is my personal view of the matter that I feel the greater reluctance in accepting the suggestion that I should distinguish the National Telephone case on the ground that the present point was not there taken, because I should lay myself open to the charge of acting upon my own opinion against that of the Court of Appeal and the House of Lords. Therefore I feel compelled to give judgment for the Crown.

Appeal dismissed.

Solicitors for appellants: *King, Wigg, Robertson & Brightman.*
Solicitor for respondents: *Solicitor of Inland Revenue.*

J. F. C.

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Jan. 19.

MORAN & SON, LIMITED, APPELLANTS *v.* MARSLAND, RESPONDENT.

London—"Building"—Reservoir authorized by Special Act—Supervision of District Surveyor—London Building Act, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 138, 145, 154.

By s. 138 of the London Building Act, 1894, "subject to the provisions of this Act and to the exemptions in this Act mentioned, every building or structure, and every work done to, in, or upon any building or structure . . . . shall be subject to the supervision of the district surveyor appointed to the district in which the building or structure is situate." By s. 145 notice is to be given to the district surveyor by the builder or other person causing or directing the work to be executed, when a building or structure or work is about to be begun; and by s. 154 certain fees are payable by the builder, or in his default by the owner or occupier of the building or structure, to the district surveyor.

A water company was empowered by a special Act to make and maintain in the lines and situation and according to the levels shewn on the deposited plans and sections the reservoirs, lines of pipes, and other works thereinafter described, with all proper wells, filtering beds, and other appliances for collecting, filtering, storing, and distributing water. The company constructed, under the powers of the Act, two covered storage reservoirs in the metropolitan district of the cubical extent of 2,900,000 cubic feet and 2,769,000 cubic feet respectively. The reservoirs had a flooring of concrete, with walls of brickwork backed by concrete and earth, and were covered in by a series of brick arches supported by brick piers twenty feet high. The brick arches were covered with a layer of concrete with earth on top. The reservoirs in some portion projected above the surface of the ground:—

Held, that the reservoirs were "buildings or structures" within the meaning of the above sections of the London Building Act, 1894; that the application of those sections was not inconsistent with the provisions of the special Act; and that therefore it was the duty of the district surveyor to supervise the construction of the reservoirs, and that he was entitled to his fees for such supervision.

CASE stated by a metropolitan police magistrate.

The appellants were summoned to answer a claim by the respondent, who was the district surveyor for Camberwell, under the London Building Act, 1894 (1), to recover 297*l.* 10*s.* for fees

(1) London Building Act, 1894 (57 & 58 Vict. c. ccxiii.), s. 138: "Subject to the provisions of this Act and to the exemptions in this Act mentioned, every building or structure, and every work done to, in, or upon any building or structure, and all matters

for surveying certain buildings, namely, two covered storage reservoirs of the areas respectively of 115,387 square feet and 120,934 square feet.

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relating to the width and direction of streets, the general line of buildings in streets, the provision of open spaces about buildings, and the height of buildings, shall be subject to the supervision of the district surveyor appointed to the district in which the building or structure is situate."

Sect. 145: "In the following cases and at the following times (that is to say):—(*a*) where a building or structure or work is about to be begun, then two clear days before it is begun; and (*b*) where a building or structure or work is after the commencement thereof suspended for any period exceeding three months, then two clear days before it is resumed; and (*c*) where during the progress of a building or structure or work the builder employed thereon is changed, then two clear days before a new builder enters upon the continuance thereof; the builder or other person causing or directing the work to be executed shall serve on the district surveyor a building notice respecting the building or structure or work. Every building notice shall state the situation, area, height, number of storeys, and intended use of the building or structure, and the number of buildings or structures, if more than one, and the particulars of the proposed work, and the name and address of the person giving the notice and those of the owner then in possession of and the occupier of the building or structure or of its site or intended site. All works in progress at the same time to, in, or on the same building or structure may be included in one building notice."

Sect. 146: "Every district surveyor shall, upon the receipt of any such notice as aforesaid, and also upon any work being observed by or made known to him which is affected by the provisions of this Act or by-laws made thereunder, but in respect of which no notice has been given, and also from time to time during the progress of any work affected by such provisions and by-laws as often as may be necessary for securing the due observance of such provisions and by-laws, survey any building or work hereby placed under his supervision, and cause all such provisions and by-laws to be duly observed."

Sect. 154: "(1.) There shall be paid by the builder, or in his default by the owner or occupier, as the case may be, of the building or structure in respect whereof the same are chargeable to every district surveyor in respect of the several matters mentioned in Parts I. and III. of the Third Schedule to this Act, the fees therein specified . . . ."

Sect. 201: "The following buildings and works shall be exempt from the operation of Parts VI. and VII. of this Act:—(1.) Bridges, piers, jetties, embankment walls, retaining walls, and wharf or quay walls . . ." (Part VI. of the Act, which contains ss. 53 to 81 inclusive, deals with "Construction of buildings," and Part VII., which contains ss. 82 to 86 inclusive, deals with "Special and temporary buildings and wooden structures.")

Part I. of Sched. III. specifies certain fees as payable to the district surveyor in respect of (among other things) new buildings.

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At the hearing of the summons the following facts were admitted or proved:—

The appellants were a firm of builders and had constructed on behalf of the Metropolitan Water Board, under a contract dated February 15, 1906, the two covered storage reservoirs referred to in the respondent's claim, of a cubical extent of 2,900,000 cubic feet and 2,769,000 cubic feet respectively, and were in course of constructing two other such reservoirs. The respondent was the district surveyor appointed to the district of Camberwell in which the reservoirs were situate.

The Metropolitan Water Board were authorized by the Southwark and Vauxhall Water Act, 1894, s. 5 (1) (as the successors of the Southwark and Vauxhall Water Company), and by the Metropolitan Water Board Act, 1906, s. 4 (2), to construct the said covered storage reservoirs.

The reservoirs were constructed, and each of the covered storage reservoirs had a floor composed of concrete, and walls constructed of brickwork backed by concrete and earth, and was completely covered in by a series of brick arches supported by brick piers twenty feet high. The brick arches were covered with a layer of concrete, which in its turn was covered with earth. The reservoirs in some portion projected above the surface of the ground.

(1) Southwark and Vauxhall Water Act, 1894 (57 & 58 Vict. c. clxiv.), s. 5: "Subject to the provisions of this Act the company may make and maintain, in the lines and situation and according to the levels shewn on the deposited plans and sections, the reservoirs, lines of pipes, and other works hereinafter described, with all proper wells, filtering beds, dams, sluices, cuts, channels, pipes, tanks, engines, buildings, machinery, and other works and conveniences connected therewith, for collecting, filtering, storing, and distributing water . . . . "

(2) Metropolitan Water Board Act, 1906 (6 Edw. 7, c. lxxxvii.), s. 4: "It shall be lawful for the Board upon lands belonging to them to continue the construction of and to complete, and at all times thereafter maintain, the service reservoir situate partly in the parish of Camberwell or St. Giles, Camberwell, and partly in the parish of Lewisham, in the county of London, described in and authorized by the Southwark and Vauxhall Water Act, 1894, together with all such approaches, communications, works, and conveniences ancillary or subsidiary thereto, or connected therewith, as may be necessary or expedient, notwithstanding that the period by that Act limited for the completion of the said reservoir has expired . . . . "

The respondent stated that he was never supplied officially with copies of any of the parliamentary or other plans and specifications according to which the covered storage reservoirs were constructed, but that a plan was given to him by a member of the Institute of Engineers.

Before commencing the work the appellants gave notice, as required by s. 145 of the London Building Act, 1894, to the respondent that they were about to carry out the same. The appellants never in any way consulted the respondent in relation to the works after giving the building notice. The respondent surveyed the premises in the ordinary course of his duties during the two years they were in course of construction. In January, 1908, the respondent sent to the appellants a claim for his fees as district surveyor under the Act for his supervision of the work of constructing the two storage reservoirs.

It was contended on behalf of the appellants (*a*) that the covered storage reservoirs were not "buildings or structures" within the meaning of ss. 138 and 154 of the London Building Act, 1894, but were in the nature of embankment or retaining walls; (*b*) that the covered storage reservoirs, having been constructed under the powers of the special Acts of Parliament hereinbefore mentioned, were not subject to the provisions of the London Building Act, 1894, nor to the supervision of the respondent as being the district surveyor to the district in which the reservoirs were situate, inasmuch as the provisions of the special Acts were inconsistent with the provisions of the London Building Act, 1894. In particular it was contended that this was so since, but for the special Acts, the reservoirs in question could not lawfully have been constructed in London at all, as by ss. 75 and 76 of the London Building Act, 1894, the cubical extent of the building must not exceed 250,000 cubic feet, or in certain cases, with the consent of the London County Council, 450,000 cubic feet, whereas the reservoirs in question were of a cubical extent of 2,900,000 cubic feet and 2,769,000 cubic feet respectively. The following cases were cited in support of the appellants' contentions: *Hampton Urban Council* v. *Southwark and Vauxhall Water Co.* (1); *Surrey Commercial Dock Co.* v.

(1) [1900] A. C. 3.

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Bermondsey Corporation (1); *City and South London Ry. Co.* v. *London County Council.* (2)

It was contended on behalf of the respondent (*a*) that the reservoirs were "buildings or structures" subject to the provisions of the London Building Act, 1894, and to the supervision of the respondent, and that the respondent was therefore entitled to his fees according to the scale laid down in Part I. of Sched. III. to the Act; (*b*) that the powers conferred upon the water company or Water Board by its special Acts were not inconsistent with the London Building Act, 1894. The following cases were cited in support of the respondent's contention: *Whitechapel Board of Works* v. *Crow* (3); *Charing Cross and Strand Electricity Supply Corporation* v. *Woodthorpe* (4); *County of London Electric Supply Co.* v. *Perkins* (5); *London County Council* v. *Wandsworth and Putney Gas Co.* (6)

The magistrate gave judgment as follows: "I have come to the conclusion in this case that this reservoir is a building in fact, and that in law it is a building coming within the scope of the London Building Act, 1894, and therefore that the surveyor is entitled to his fees. I have arrived at this conclusion in consequence of the decisions of the judges of the High Court in the cases of *London County Council* v. *Wandsworth and Putney Gas Co.* (6), *Charing Cross and Strand Electricity Supply Corporation* v. *Woodthorpe* (4), and *Whitechapel Board of Works* v. *Crow.* (3) I do not see anything inconsistent between the powers of the defendant company and the powers of the surveyor under the Building Act, and I accordingly make an order for payment of the sums claimed."

The question for the opinion of the Court was whether the magistrate's determination was correct in law.

Danckwerts, K.C. (*Courthope-Munroe* with him), for the appellants. These reservoirs are not "buildings" within the meaning of s. 138 of the London Building Act, 1894, so as to entitle the district surveyor to his fees under s. 154 for

(1) [1904] 1 K. B. 474.
(2) [1891] 2 Q. B. 513.
(3) (1901) 84 L. T. 595.
(4) (1903) 88 L. T. 772.
(5) (1908) 98 L. T. 870.
(6) (1900) 82 L. T. 562.

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supervising their construction. The Act divides buildings within its scope into three classes, namely, domestic buildings, public buildings, and buildings of the warehouse class. Those three classes of buildings are defined in s. 5, sub-ss. 26, 27, and 28, and the only class within which a reservoir could possibly come would be a building of the warehouse class, which is defined as meaning "a warehouse, factory, manufactory, brewery, or distillery, and any other building exceeding in cubical extent 150,000 cubic feet, which is neither a public building nor a domestic building." These reservoirs, however, do not come within that class of building, because by s. 75 no building of the warehouse class, with certain exceptions not material to this case, is to extend to more than 250,000 cubic feet, unless under s. 76 the county council consent to an additional cubical extent not exceeding 450,000 cubic feet. The cubical extent of these reservoirs far exceeds those figures. These reservoirs, therefore, could not have been constructed in accordance with the provisions of the Act; indeed, their construction is expressly prohibited by the Act.

Further, a building to come within the Act must be one to which some of the provisions of the Act relating to the construction of buildings apply. None of the provisions of Part VI. of the Act, which relates to the construction of buildings, are applicable to reservoirs such as those in the present case. Nor can Part II. of Sched. I. to the Act, which deals with the mode of constructing buildings of the warehouse class, apply. Sect. 82, which comes within Part VII. of the Act, does not apply to these reservoirs, because in the first place it only applies to a building of smaller dimensions, and in the second place the consent of the county council is necessary for the construction of a building under that section, whereas here the special Act authorized the construction of these reservoirs, and no consent of the county council was required. Sect. 146, which requires the district surveyor to survey any building or work which is placed under his supervision and cause all the provisions of the Act and the by-laws made thereunder to be duly observed, also shews that a building to come within the supervision of the district surveyor must be one to which some of the provisions of the Act and of the

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by-laws apply. The provisions of ss. 151, 152, and 153, which deal with contraventions of the Act, cannot possibly apply to these reservoirs. The district surveyor therefore had no duty under ss. 138, 145, and 146 of the Act to supervise the construction of the reservoirs, and no fees became payable to him under the provisions of ss. 154 and 157. The fees specified in Part I. of Sched. III. to the Act are wholly inapplicable to a building such as a reservoir. These reservoirs, therefore, are not "buildings" within the meaning of the Act. The magistrate has found that the reservoirs are buildings in fact, and consequently it is not necessary to consider the word "structure"; but, if it is necessary, a structure means something of the same general nature and character as a building—*Venner* v. *M'Donell* (1)—and the same reasoning applies to it as to a building.

Secondly, s. 5 of the Southwark and Vauxhall Water Act, 1894, gave the predecessors of the Metropolitan Water Board power to make and maintain the reservoirs in the lines and situation and according to the levels shewn on the deposited plans, and the reservoirs were constructed under that Act. The deposited plans shew the dimensions and character of the reservoirs and are inconsistent with the supervision of the district surveyor, and where those plans are silent as to the mode of construction the owners had to exercise their own judgment honestly as to how and with what materials the work was to be executed. Those special statutory powers being inconsistent with the general provisions of the London Building Act, 1894, these latter provisions do not apply: *City and South London Ry. Co.* v. *London County Council* (2); *London County Council* v. *London School Board* (3); *Surrey Commercial Dock Co.* v. *Bermondsey Corporation.* (4) Parliament has thrown the responsibility upon the Water Board of constructing the reservoirs according to the plans and under the advice of their skilled engineers, and it would be absurd to allow a district surveyor, who probably has no qualifications for the purpose, to supervise the work of those skilled engineers. The reservoirs, therefore, are not "buildings" placed by the London Building Act, 1894, under the supervision

(1) [1897] 1 Q. B. 421, at p. 426.
(2) [1891] 2 Q. B. 513.
(3) [1892] 2 Q. B. 606.
(4) [1904] 1 K. B. 474.

of the district surveyor, and he is not entitled to recover his fees for supervising the work. [He also referred to *Westminster Corporation* v. *Watson*. (1)]

Avory, K.C. (*Roland Burrows* with him), for the respondent. These reservoirs are "buildings" within the London Building Act, 1894. Notwithstanding that the reservoirs were constructed under the powers of a special Act, there is nothing in the latter Act which is inconsistent with the provisions of the general Act. In *Surrey Commercial Dock Co.* v. *Bermondsey Corporation* (2) the Court seem to have thought that the right of the local authority to regulate the depth of the foundations of the new building in the dock was inconsistent with the power and duty of the dock company under their special Act properly to maintain the dock and works, as it might affect the stability of the other works, and that the Act contemplated that the proper precautions for the construction and maintenance of the dock and works should rest with the dock company, and they held that the interference and control involved in s. 76 of the Metropolis Management Act, 1855, were inconsistent with the powers conferred upon the dock company by their special Act. That is a very different case from the present one. By s. 53 of the London Building Act, 1894, subject to any by-laws of the county council, the walls of buildings are to be constructed of the substances and in the manner prescribed by the Act or mentioned in Sched. I.; and clause 2 of the preliminary part of that schedule requires every wall constructed of brick, stone, or other similar substances to be properly bonded and solidly put together with mortar or cement. That is not provided for in the special Act or the deposited plans, and therefore it comes under the supervision of the district surveyor under the Building Act of 1894 to see that that work is properly done according to the requirements of the Act and the by-laws. Again, by-law 3, par. 4, of the by-laws made by the county council under s. 16 of the Metropolis Management and Building Act, 1878 (41 & 42 Vict. c. 32), which are kept alive by s. 216 of the London Building Act, 1894, requires all brick and stone work to be put together with

(1) [1902] 2 K. B. 717. (2) [1904] 1 K. B. 474.

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good mortar or good cement. The district surveyor has to see that that requirement is carried out. These are two illustrations of the work of supervision which the district surveyor has to do, and which is consistent with the provisions of the special Act, the latter Act only giving power to construct two reservoirs of a certain size, but not prescribing the mode in which they are to be constructed. *City and South London Ry. Co.* v. *London County Council* (1) and *London County Council* v. *London School Board* (2) merely decided respectively that the building could be erected in one case beyond the general line of buildings and in the other case within twenty feet of the centre of the roadway. Those cases did not decide that the supervision of the district surveyor was inconsistent with the special Act. The decisions in *Charing Cross and Strand Electricity Supply Corporation* v. *Woodthorpe* (3) and *County of London Electric Supply Co.* v. *Perkins* (4) also shew that there is no such inconsistency. If, therefore, these reservoirs are "buildings" within the London Building Act, 1894, the district surveyor is entitled to his fees for supervising their construction. Where the question whether a certain work is a "building" within the Act depends on size and such like elements, it is a question of fact in each case whether it is a building: *Charing Cross and Strand Electricity Supply Corporation* v. *Woodthorpe* (3); *County of London Electric Supply Co.* v. *Perkins*. (4) The magistrate has found that these reservoirs are buildings. They certainly come within s. 82 of the London Building Act, 1894, and, but for the authority of the special Act to construct them, the consent of the county council would have been necessary for that purpose. The reservoirs, therefore, are "buildings" within the Act, and the district surveyor, having surveyed the work, is entitled to his fees: *Westminster Corporation* v. *Watson*. (5)

Danckwerts, K.C., in reply. In *Surrey Commercial Dock Co.* v. *Bermondsey Corporation* (6) the building in question was an ordinary workshop and the special Act contained no provision authorizing the construction of the workshop, and the process of

(1) [1891] 2 Q. B. 513.
(2) [1892] 2 Q. B. 606.
(3) 88 L. T. 772.
(4) 98 L. T. 870.
(5) [1902] 2 K. B. 717, at p. 731.
(6) [1904] 1 K. B. 474.

construction required just as much supervision as the process of constructing the reservoirs in the present case. That case is clearly in point.

LORD ALVERSTONE C.J. The appellants, who were the contractors for the construction of two covered storage reservoirs under a contract of February 15, 1906, object to an order of the magistrate for payment by them of a certain sum to the district surveyor for his fees for supervising the construction of the reservoirs under the London Building Act, 1894. Before commencing the work the appellants gave notice, under s. 145 of the Act, to the district surveyor that they were about to begin the work. Notwithstanding that notice, it is open to the appellants to contend that in law the service of that notice was unnecessary and cannot affect the question which we have to decide. The case states that the district surveyor surveyed the works in the ordinary course of his duties during the two years that they were in course of construction, and the question is whether the district surveyor is entitled to his fees for so doing. That question divides itself into two—first, whether the reservoirs are "buildings" within the meaning of the London Building Act, 1894, and, secondly, if they are buildings within the Act, whether the provisions of the special Act (the Southwark and Vauxhall Water Act, 1894) are inconsistent with the provisions of the general Act so as to make those latter provisions, so far as they relate to the supervision of the district surveyor, inapplicable to these reservoirs.

With regard to the first question, s. 138 of the London Building Act, 1894, provides that every building or structure, with certain exceptions not material to the present case, shall be subject to the supervision of the district surveyor; and s. 145 requires notice to be served on the district surveyor when a building, structure, or work is about to be begun. In construing the Act one ought not to forget that its object, as stated in the preamble, is to confer further powers in order to secure, among other things, the sound construction of buildings. It is not necessary to say much upon the question as to whether these reservoirs are buildings or structures within the meaning of

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the Act. The magistrate has found that they are buildings in fact, and has held that in law they are buildings within the scope of the Act. It does not seem to me that anything turns in this case upon the use of the word "building" as contrasted with "structure." In *Whitechapel Board of Works* v. *Crow* (1), *Charing Cross and Strand Electricity Supply Corporation* v. *Woodthorpe* (2), and *County of London Electric Supply Co.* v. *Perkins* (3) it was decided that a structure, namely, a street box, constructed under the foot pavement of a street in connection with the supply of electric energy, was a "structure" within the London Building Act, 1894, and that notice was required to be given to the district surveyor under s. 145. In those cases it was as strenuously contended as it has been in the present case that the structure there in question was not a "building, structure, or work" within the meaning of the Act so as to require the supervision of the district surveyor during its construction. The only distinction between those cases and the present case, so far as control over the construction is concerned, is that in those cases the provisional orders under which the boxes were constructed required the work to be done according to the regulations of the Board of Trade and subject to the approval of the Postmaster-General, as well as the approval of the county council or the local authority, whereas in the present case it is not suggested that apart from the special Act, which I will deal with later, there is any statutory authority which can control the construction of these reservoirs. Those cases are binding upon us, and in my opinion these reservoirs are buildings or structures within the Act. It is said that the Act divides buildings into three classes, namely, domestic buildings, public buildings, and buildings of the warehouse class; that if a building cannot be brought within one of those three classes it does not come within the Act; that the only class within which these reservoirs can possibly come is the latter class; and that on account of their cubical extent they do not come within that class, and are therefore outside the Act altogether. I cannot agree with that contention. Sect. 82 of the Act shews that there may be buildings

(1) 84 L. T. 595. (2) 88 L. T. 772.
(3) 98 L. T. 870.

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or structures within the scope of the Act other than those above mentioned, and as these reservoirs are obviously buildings or structures in the ordinary acceptation of those terms, I am unable to accede to the contention that they are not buildings or structures within the Act.

The second contention put forward on behalf of the appellants seems to me to raise a question of greater difficulty, namely, that the provisions of the special Act under which the reservoirs were constructed are inconsistent with the supervision of the district surveyor under the London Building Act, 1894. The special Act is the Southwark and Vauxhall Water Act, 1894, s. 5 of which provides that "the company may make and maintain, in the lines and situation and according to the levels shewn on the deposited plans and sections, the reservoirs, lines of pipes, and other works hereinafter described, with all proper wells, filtering beds, dams, sluices, cuts, channels, pipes, tanks, engines, buildings, machinery, and other works and conveniences connected therewith, for collecting, filtering, storing, and distributing water." It was suggested that the deposited plans gave such a description of the reservoir as to render the supervision of the district surveyor unnecessary, inasmuch as they indicated how the work was to be carried out. We have seen the deposited plans, and they seem to us to contain nothing more than ordinarily appears upon such plans, such as the site, levels, and size of the reservoirs. They do not prescribe, for instance, how the reservoirs are to be constructed, the quality of the bricks, stone, or other materials, or how those materials are to be bonded or put together, nor do they contain any provisions for the safety of the public. Therefore the case raises the simple question whether the mere statutory power to construct a work such as a reservoir is of itself sufficient to oust the application of those provisions of the London Building Act, 1894, which relate to the supervision of the district surveyor. Speaking for myself, I have no doubt that some of the things which have been mentioned to us—such, for instance, as the thickness of the concrete, the quality of the mortar, and the mode of binding the materials together—require careful supervision, and I have no doubt that proper supervision is given by competent engineers. But I can see nothing in the

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special Act to shew that the supervision which must be exercised by the engineers is to supersede the supervision of the district surveyor.

I will now consider how the authorities stand upon this point. I may pass over the case of *Venner* v. *M'Donell* (1) as having no application, the decision in that case being that the movable seating accommodation at the Agricultural Hall at Islington was not a "building, structure, or work" within the London Building Act, 1894. That case obviously will not assist us in determining the present question. The other three cases cited on behalf of the appellants require careful consideration. The first case is *City and South London Ry. Co.* v. *London County Council.* (2) In that case a railway company had obtained statutory powers to make an underground railway, with all necessary works connected therewith, and to take and use such of the lands delineated on the deposited plans as might be required for that purpose. The company built a station, which was necessary for the purposes of the railway, within the limits of deviation, but part of it projected beyond the general line of buildings in the street. It was held that s. 75 of the Metropolis Management Act, 1862, which at that time was the statutory provision relating to the general line of buildings, did not apply. The next case is *London County Council* v. *London School Board* (3), where it was held that the statutory power to erect a school on a particular site was inconsistent with the application to that building of the provisions of the Metropolis Management and Building Acts Amendment Act, 1876, forbidding the erection, without the consent of the Metropolitan Board of Works (now the London County Council), of any building, wall, or fence within twenty feet of the centre of the highway. Those two cases do not seem to me to have much bearing upon the question whether the provisions of the London Building Act, 1894, which deal with the supervision of the district surveyor are inconsistent with the provisions of the special Act under which these reservoirs were constructed. The next case is *Surrey Commercial Dock*

(1) [1897] 1 Q. B. 421. (2) [1891] 2 Q. B. 513.
(3) [1892] 2 Q. B. 606.

Co. v. *Bermondsey Corporation* (1), which is the nearest case to the present, and there the question arose under s. 76 of the Metropolis Management Act, 1855, which provides for notice to be given to the local authority before beginning to lay or dig out the foundation of any new house or building or to rebuild any house or building. The dock company had special statutory powers to construct certain works, and I will assume that the deposited plans did not specify in detail the mode in which those works were to be constructed. In carrying out those works it became necessary as ancillary thereto to demolish a workshop and to erect a new workshop in its place. I was a party to that decision, and we held that the interference and control involved in s. 76 of the general Act of 1855 were inconsistent with the powers conferred upon the dock company by their special Act, and that therefore the dock company need not give notice to the local authority of their intention to erect the new workshop. We did not rely solely upon the section of the special Act which gave the company power to construct the works, but, taking that section with other sections in the Act, we thought that the provisions of s. 76 of the general Act were inconsistent with the powers conferred upon the company by their special Act. The question therefore before us is whether s. 5 of the special Act of 1894, which gives power to the water company, the predecessors of the Metropolitan Water Board, to "make and maintain" the reservoirs, is inconsistent with the supervision of the district surveyor under the London Building Act, 1894. In my opinion it is not. It cannot be put higher than the provisional order authorizing the construction of the street box under the foot pavement in the street in the three cases I have mentioned in the earlier part of this judgment, where the requirements of the Board of Trade and of the Postmaster-General had to be complied with. In those cases this Court was of opinion that there was nothing in the control given to the Board of Trade and to the Postmaster-General which ousted the right of supervision given to the district surveyor. We are bound by those cases, and they seem to me to be indistinguishable from the present case. The appeal must be dismissed.

(1) [1904] 1 K. B. 474.

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BIGHAM J. I agree. Assuming that the magistrate was right when he said that these reservoirs were in fact buildings, two questions arise. The first is whether the reservoirs are "buildings or structures" within the meaning of the London Building Act, 1894. The second is whether there is anything in the Southwark and Vauxhall Water Act, 1894, which is inconsistent with the application of the provisions in the London Building Act, 1894, relating to the supervision of the district surveyor. One of the objects of the London Building Act is to place the construction of all buildings within the metropolitan area under the supervision of the district surveyor. That appears from the preamble to the Act, and from s. 138, which provides that, subject to the provisions of the Act and to the exemptions mentioned in the Act, "every building or structure" shall be subject to the supervision of the district surveyor. I do not feel disposed to place any limitation upon those words unless the provisions of the special Act are inconsistent with the supervision of the district surveyor over the particular work. I cannot find anything in the special Act which is inconsistent with the application of that section to the construction of these reservoirs. As, therefore, there is nothing inconsistent therewith in the special Act, and as the London Building Act applies to all buildings and structures, it is the duty of the district surveyor under the Act to supervise the construction of the reservoirs, and he is entitled to fees for the work of supervision. I may perhaps add this, that the appellants themselves seem to have been under the impression that the work required the supervision of the district surveyor, because they served notice upon him before they began the work. In these circumstances the section of the London Building Act, 1894, which entitles the district surveyor to his fees for supervision applies.

WALTON J. I agree. The question is whether the district surveyor is entitled, under the London Building Act, 1894, to recover his fees for supervising the construction of these two reservoirs. The case states that he supervised the work during the two years in which the reservoirs were under construction, and we have to determine whether he is entitled to

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his fees for that work of supervision. By s. 138 of the Act every building or structure, with certain exceptions, is to be subject to the supervision of the district surveyor. Prima facie it looks as if these reservoirs, which the magistrate has found to be buildings, come within that section, but, as I understand the argument on behalf of the appellants, it is contended that the reference to a building or structure in that section must be limited to a building or structure to which some requirement of the London Building Act, 1894, applies; and it is said that these reservoirs are buildings to which no requirement of the Act applies. Counsel for the respondent has answered that argument by shewing that there are some requirements of the London Building Act, 1894, which cannot be said to have no application to these reservoirs. For instance, s. 53 requires the walls of a building to be of a certain thickness in accordance with Sched. I. to the Act, and under the by-law to which we have been referred all brick and stone work shall be put together with good mortar or good cement.

I can find nothing which leads me to suppose that the requirements of the Act do not apply to these reservoirs. Accordingly these reservoirs come within the word "building" as used in the Act, and therefore they come within s. 138 and are subject to the supervision of the district surveyor, who is entitled to his fees for supervising their construction.

It is then said that even if there are certain requirements of the London Building Act, 1894, which will prima facie apply to these reservoirs, still the provisions of the special Act, under which the reservoirs were constructed, are inconsistent with the supervision of the district surveyor, and that therefore the sections of the general Act relating to the supervision of the district surveyor do not apply. I have not myself seen anything in the special Act which is inconsistent with the requirements I have referred to. There seems to me to be nothing in the special Act which prevents the sections of the general Act relating to supervision from applying to the construction of these reservoirs. It is not our province to consider whether the supervision of the district surveyor in a case like the present is useful or necessary for the protection of the public. We have

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only to consider whether the case comes within the Act, and in my opinion it does.

Appeal dismissed.

Solicitors for appellants: *Mackrell, Maton, Godlee & Quincey.*
Solicitor for respondent: *Walter C. Williams.*

W. F. B.

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Jan. 28.

WILLEY *v.* HUCKS.

Sheriff—"Execution for a sum exceeding 20l."—Contingent Expenses—Bankruptcy Act, 1890 (53 & 54 *Vict.* c. 71), *s.* 11, *sub-s.* 2.

Although a sheriff, or high bailiff of a county court, when levying under a warrant of execution is entitled to seize sufficient goods to cover the contingent expenses of possession money, appraisement, and sale, yet in ascertaining whether the execution is "for a sum exceeding 20*l.*" within the meaning of s. 11 of the Bankruptcy Act, 1890, and whether consequently he is obliged to retain the proceeds of execution as therein directed, the judgment debt and poundage only can be taken into consideration, and not the expenses of possession money, appraisement, and sale, unless those expenses have been actually incurred.

APPEAL from the Mayor's Court.

The plaintiff Willey had been defendant in an action of *Hibberd* v. *Willey* in the City of London Court, and, being successful in that action, had recovered judgment for his costs, amounting to 16*l.* 13*s.* 2*d.*, and obtained a warrant of execution. As Hibberd resided in the district of the Clerkenwell County Court, the warrant was forwarded for levy to the registrar of that Court and issued by him to the high bailiff, Mr. Hucks, the present defendant. The warrant (form 165 of the County Court Forms), after reciting the order that the plaintiff in the action of *Hibberd* v. *Willey* should pay the sum of 16*l.* 13*s.* 2*d.* for the defendant's costs, directed the high bailiff to "levy by distress and sale of the goods and chattels of the plaintiff . . . . the sum stated at the foot of this warrant, being the amount due to the defendant under the said order together with the costs of this execution." The sum stated at the foot of the warrant was "Costs adjudged 16*l.* 13*s.* 2*d.* Poundage for issuing this warrant

1*l.* 2*s.* Total amount to be levied [with fees for execution of warrant as indorsed hereon] 17*l.* 15*s.* 2*d.*" On the back of the warrant were stated the "Fees for execution of this warrant. The fees for keeping possession of the goods seized . . . . are sixpence in the pound per day not exceeding seven days on the value of such goods to be fixed by appraisement in case of dispute . . . . If the goods are sold the following fees are chargeable for the appraisement and sale and no others:—For the appraisement sixpence in the pound on the value of the goods appraised over and above the stamp duty . . . . For the sale . . . . one shilling in the pound on the net produce of the sale."

The high bailiff sent a man to Hibberd's house to enter into possession, and it was alleged that he did so, seizing a safe. The amount for which he so levied was 23*l.* 1*s.* 3*d.*, made up as follows:

	£	s.	d.
Debt as above mentioned with poundage -	17	15	2
Seven days' possession—fees - - -	3	10	0
Appraisement and stamp duties - -	0	13	1
Sale fees - - - - - -	1	3	0
	23	1	3

Within half an hour after the entry of the bailiff Hibberd paid to him the sum of 17*l.* 15*s.* 2*d.*, and thereupon the bailiff went out. By s. 11, sub-s. 2, of the Bankruptcy Act, 1890, "Where under an execution in respect of a judgment for a sum exceeding twenty pounds the goods of a debtor are sold or money is paid in order to avoid sale, the sheriff shall deduct his costs of the execution from the proceeds of sale or the money paid, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and a receiving order is made against the debtor thereon or on any other petition of which the sheriff has notice, the sheriff shall pay the balance to the official receiver or, as the case may be, to the trustee, who shall be entitled to retain the same as against the execution creditor." By s. 31 the Act is to be construed as one with the Bankruptcy Act, 1883, by

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s. 168 of which "sheriff includes any officer charged with the execution of a writ or other process." Willey claimed to receive the amount of his judgment debt from the high bailiff forthwith, but the latter, being of opinion that the execution was for a sum exceeding 20*l.*, considered that he was bound to retain it for fourteen days as directed by the above-mentioned section. Willey accordingly brought an action against the high bailiff in the Mayor's Court to recover the amount as money had and received to the plaintiff's use. At the hearing of that action it was disputed that there had been any seizure of Hibberd's goods at all under the warrant of execution, but the Common Serjeant, without deciding that question, held that the execution, if there was one, was for a sum not exceeding 20*l.* He accordingly gave judgment for the plaintiff. The high bailiff appealed.

Rowlatt and *Merlin*, for the appellant. The execution was for a sum exceeding 20*l.* Under s. 146 of the County Courts Act, 1888, where the Court has given a judgment for the payment of money, the registrar is to issue to the high bailiff a warrant to levy the amount of the judgment "and also the costs of the execution." By s. 154 no sale of any goods taken in execution is to take place "until after the end of five days at least next following the day on which such goods shall have been so taken." Consequently wherever goods taken in execution are sold the costs of execution will include at least seven days' possession money. But as the high bailiff when seizing goods cannot know whether the debtor will pay the amount of the judgment to avoid a sale, he must obviously seize sufficient to cover his possible costs up to and including sale, for otherwise he would have no security for the satisfaction of those costs if incurred. The question is whether, if the debtor pays the amount of the judgment and poundage immediately upon seizure, so that no possession fees or costs of appraisement or sale are in fact incurred, the high bailiff is entitled, for the purpose of computing whether the execution is or is not an execution for a sum exceeding 20*l.*, to add to the judgment debt and poundage the costs of seven days' possession, appraisement, and sale, upon the ground that at the time of seizure he had to make himself secure by

seizing enough to cover those contingent costs. In *Ex parte Liverpool Loan Co.* (1), where judgment had been entered against a debtor for 48*l.* 19*s.* and the sheriff levied and sold goods of the debtor to the amount of 50*l.* 11*s.*, being the amount of the judgment with 1*l.* 12*s.* for the costs of the execution, it was held that the goods had "been taken in execution in respect of a judgment for a sum exceeding 50*l.* and sold" within the meaning of s. 87 of the Bankruptcy Act, 1869, which is the section corresponding to s. 11, sub-s. 2, of the Act of 1890. James L.J. said that the words must be read as meaning "taken in execution for a sum exceeding 50*l.* in respect of a judgment," and that they applied wherever a levy had been made for more than 50*l.* and the goods sold. The incidental expenses of the execution subsequent to seizure are only payable by the execution debtor so far as they are actually incurred, but if the goods have been seized to cover those expenses they are none the less taken in execution for the larger amount if those expenses are not required. The question is, for what amount has the law at the time of the seizure put its hand upon the goods? [They also referred to *Howes* v. *Young* (2) and *Ex parte Sims, In re Grubb.* (3)]

Secondly, even if the execution was for a sum not exceeding 20*l.*, the action for money had and received will not lie. By Order II., r. 34, of the County Court Rules the high bailiff levying or receiving any money by virtue of the process of any county court is directed to pay over the same to the registrar of the Court of which he is high bailiff. He owes no duty to the execution creditor to pay over the money directly to him. The action should have been for damages for delay in paying over the money to the registrar, whereby it was longer in reaching the hands of the plaintiff.

[BIGHAM J. We will treat the case as if it were alternatively an action for money had and received or for damages.]

If it is to be treated as an action for damages, the damages must be purely nominal, for the plaintiff will get his money from the registrar, whereas the Common Serjeant gave judgment for 17*l.* 15*s.* 2*d.*

(1) (1872) L. R. 7 Ch. 732. (2) (1876) 1 Ex. D. 146.
(3) (1877) 5 Ch. D. 375.

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G. W. H. Jones, for the respondent. The execution was not for a sum exceeding 20*l.* The policy of the Act was to prevent more than 20*l.* being taken from the debtor's estate which would be divisible among the general body of his creditors; and if the execution has been in fact discharged by the payment out of that estate of less than 20*l.*, the reason for requiring the high bailiff to retain the money is gone. The question is, what must be paid to get rid of the execution? Under the Act of 1869 the corresponding section did not apply unless the goods had not only been seized for more than 50*l.*, but also sold. In the cases decided under that section it was held that in computing the 50*l.* all the expenses which the sheriff was entitled to charge at the time of the sale might be included. The case of *Turner* v. *Bridgett* (1) shewed that the amount for which the goods were seized was not the test, for after a seizure for more than 50*l.* the creditor might direct a sale for less than 50*l.* with the very object of avoiding the operation of the section. In *Ex parte Sims, In re Grubb* (2) James L.J. said, "The sum for which the goods could be redeemed at the time of the sale is that to which we must look"; and that sum was in that case held to include possession money where the sheriff had been compelled to take possession. But there the incidental expenses of the execution had been actually incurred; they were not, as here, contingent. The section of the present Act applies to the case not only of a sale, but of money being paid to avoid a sale; and there is no reason why a different rule should be applied according as the one alternative is adopted or the other. You have therefore to consider what were the expenses actually incurred at the date of the payment to avoid a sale.

Rowlatt, in reply.

BIGHAM J. The question in this case is whether there was "an execution . . . . for a sum exceeding twenty pounds" within the meaning of s. 11, sub-s. 2, of the Bankruptcy Act, 1890. Now the facts so far as we can gather them are these: the execution creditor had recovered judgment against the judgment debtor for a sum of 16*l.* 13*s.* 2*d.*, and he procured a warrant to be issued

(1) (1882) 8 Q. B. D. 392. (2) 5 Ch. D. 375.

to the high bailiff of the Clerkenwell County Court to levy the amount of that judgment. The terms of that warrant required him to make and levy by distress and sale of the goods of the judgment debtor the amount due to the judgment creditor "together with the costs of this execution." At the foot of the warrant the "total amount to be levied" is stated to be 16*l.* 13*s.* 2*d.* judgment debt and 1*l.* 2*s.* poundage, together amounting to 17*l.* 15*s.* 2*d.* But then the warrant contains the further words in brackets, "with fees for execution of warrant as indorsed hereon." Then there is the indorsement, which contains no figures, but contains directions as to what further sums may in certain events be raised by the officer of the Court out of the goods of the judgment debtor. There is the possession money, which is calculated upon the value of the goods seized and also depends upon the length of time not exceeding seven days that the officer of the Court is in possession of the goods. There is the cost of appraising the goods, and of the possible sale, both of which are also uncertain in amount, the former being based on the value of the goods seized, the latter on the net proceeds of the sale. Therefore the warrant is an authority to the officer of the Court to levy what the judgment creditor requires for the satisfaction of his claim and also to seize sufficient goods to realize the amount of the possible additional expenses of the levy in the event of those expenses being incurred. Armed with this warrant, the officer of the county court went to the premises of the judgment debtor, where he at once received the amount for which the warrant was made out on its face, namely, 17*l.* 15*s.* 2*d.*, and forthwith went away with the money. Under these circumstances it is perhaps doubtful whether there was any seizure in fact, or whether the money was not paid to avoid a seizure. There is no finding one way or the other. But the Common Serjeant said that it was a matter of no importance, because he was of opinion that the execution in this case was for less than 20*l.*

Now I come back to the Act of Parliament to see what it means. I omit the words "in respect of a judgment"; they are not material to the present question. The words to be construed are "Where under an execution . . . . for a sum exceeding 20*l.*

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Bigham J.

the goods of a debtor are sold or money is paid in order to avoid sale" the sheriff shall deduct his costs and retain the balance for a certain time. What is there meant by "execution for a sum exceeding 20*l.*"? What is the sum for which execution is levied? I am of opinion that it cannot mean anything more than the amount which is due in law to satisfy the execution, and which is paid to satisfy it. Here 17*l.* 15*s.* 2*d.* discharged the execution, and the execution came to an end as soon as that sum was paid. In those circumstances it seems to me impossible to say that the execution was for a larger sum. Therefore I think the Common Serjeant was right when he said that the case did not come within s. 11, sub-s. 2, and that the appeal must be dismissed.

WALTON J. I agree. Under the Act of 1869, under which the cases that have been cited were decided, the corresponding enactment, s. 87, provided that "Where the goods of any trader have been taken in execution of a judgment for a sum exceeding 50*l.* and sold" the sheriff or bailiff must retain the proceeds. Under that section the question arose as to how the words "for a sum exceeding 50*l.*" were to be read, and it was held that they should be read together with the words "taken in execution," and that the section should be read as if the words were "where the goods of any trader have been taken in execution for a sum exceeding 50*l.* in respect of a judgment." The question then arose, for what amount were the goods taken in execution? It was held that the amount included not merely the judgment debt and the costs incurred up to the date of seizure, which in the present case would be 17*l.* 15*s.* 2*d.*, but also the further costs incurred up to the date of sale. It is important to observe that under that section the obligation to retain the money did not arise unless the goods were taken in execution and sold. The section did not apply unless there was a sale; and it was because the sheriff or bailiff would have a charge on the goods for all the costs up to the date of sale that those costs were included in the computation of the amount of the execution. Then came the Act of 1890, in which the words are different: "Where under an execution in respect of a judgment

for a sum exceeding 20*l.* the goods of a debtor are sold or money is paid in order to avoid sale." The important difference is that the obligation to retain arises not merely where there has been an execution followed by a sale, but also where there has been an execution and money is paid in order to avoid a sale. It seems to me that, if you apply to the present section the principle of construction which was adopted in the cases under the Act of 1869, which decided that you might include the expenses up to the date of sale, you must include the expenses up to the date of payment where the money is in fact paid to avoid a sale. In that way you get an actual charge upon the goods. It seems to me that the true meaning of the section is that where under the execution there is an actual charge upon the goods for any sum exceeding 20*l.* the money has to be retained. It seems to me to be not only a logical application of the principle of the old cases, but also to be convenient in practice, for it enables the bailiff, when the money has come into his hands either upon a sale or upon payment, to determine at once with precision, and without taking into consideration any expenses which are purely contingent, whether the money should be retained by him or not. I agree that the appeal must be dismissed.

BIGHAM J. As it is a matter of doubt whether the action was correctly framed as one for money had and received, we will treat the case as an action for damages for non-performance by the defendant of his duty, and in that case the damages would be nominal only.

Judgment for the plaintiff for nominal damages.

Solicitor for defendant: *Solicitor to the Treasury.*
Solicitors for plaintiff: *Bruce, Searl & Co.*

J. F. C.

1909
Jan. 22, 26.

PLYMPTON ST. MARY RURAL DISTRICT COUNCIL *v.* REYNOLDS AND ANOTHER.

Local Government—Rural District Council—Special Expenses—Precept to Overseers—Appeal against Apportionment—Change of Overseers pending Appeal—Liability of Overseers to whom Precept directed—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 229, 230.

A rural sanitary authority made an apportionment under s. 229 of the Public Health Act, 1875, of the special expenses of a drainage scheme among certain contributory places in their district, including the parish of B., and issued to the respondents, who at that time were the overseers of B., a precept for the amount of the contribution payable by that parish. The respondents appealed to the Local Government Board against the apportionment. While the appeal was still pending a summons was issued against the respondents for non-payment of the amount of the precept, and the justices adjourned the hearing until the appeal should be decided. The Local Government Board eventually confirmed the apportionment, but in the interval the respondents had gone out of office as overseers. On the summons coming on for hearing the justices refused to issue their distress warrant against the respondents for the amount of the precept:—

Held, that they had jurisdiction to do so.

CASE stated by justices of Devon.

A complaint was preferred on February 12, 1908, on behalf of the appellants, the Rural District Council of Plympton St. Mary, against the respondents, Thomas Reynolds and Noel Bellamy, for that they being the overseers of the poor of the parish of St. Budeaux had been duly served with a copy of a precept issued by the appellants on October 25, 1907, ordering the overseers of the poor of the said parish to pay to the treasurer of the appellants the sum of 436*l.* on the days following, that was to say, the sum of 218*l.* on November 29, 1907, and the sum of 218*l.* on January 10, 1908, from a separate rate to be levied as provided by the Acts authorizing the same, as the contribution of the said parish to the special expenses incurred or to be incurred by the appellants under the said Acts, and that the respondents had not complied with the precept and had not paid to the said treasurer the said sum or any part thereof.

At the hearing the following facts were proved or admitted:—An apportionment of the special expenses of a drainage scheme for a district included in the appellants' district and for, amongst other places, the parish of St. Budeaux was made by the appellants on October 11, 1907, under the provisions of s. 229 of the Public Health Act, 1875, and a precept was issued by the appellants as above mentioned. The precept was duly served on the respondents on October 26, 1907. Notice in writing of the apportionment on which the precept was based was served on the respondents on January 11, 1908.

Application was made on February 5, 1908, by the appellants to the justices to issue a summons against the respondents to answer the complaint above mentioned. A summons was issued and was heard by the justices on February 12, when it appeared that the respondents had on January 22, 1908, appealed to the Local Government Board under the provisions of s. 229 of the Public Health Act, 1875, and that the decision of that Board was then pending. The justices thereupon adjourned the hearing of the complaint until February 25, 1908. When the complaint came on for hearing on February 25, as it appeared that the decision of the Local Government Board was still pending, the justices again adjourned the hearing, and so adjourned it from time to time, awaiting the decision by the Local Government Board of the appeal. The appellants, being dissatisfied with the continued adjournments of the complaint, obtained on May 15, 1908, from the King's Bench Division a rule nisi for a mandamus to the justices to hear and determine it, but on cause being shewn the rule was discharged. On July 20, 1908, the Local Government Board made an order confirming the apportionment.

The respondents went out of office as overseers in April, 1908, and the respondent Thomas Reynolds at the date of the hearing, August 26, 1908, was no longer an overseer of the parish of St. Budeaux, the respondent Noel Bellamy being re-elected with two other colleagues. No money had been paid to the appellants in pursuance of the said precept.

The complaint finally came on for hearing on August 26, 1908, and on behalf of the appellants it was contended that, the apportionment having been duly made on October 11, 1907,

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and the precept issued on October 25 and duly served on the respondents on October 26, the appellants were entitled to recover the amount demanded by the precept in the manner provided by s. 231 of the Public Health Act, 1875, and that the justices had no discretion in the matter, but must issue their warrant of distress against the respondents personally for the amount demanded by the precept.

On the part of the respondents it was contended that they were not the proper parties, inasmuch as they were no longer the overseers of the parish of St. Budeaux, and that if a warrant were issued against them they had no power to levy a rate on the said parish for the amount, and that they would have no legal claim against the present overseers and could not compel them to levy a rate. It was also contended on behalf of the respondents that, no written notice of apportionment having been served on them prior to the issue of the precept, and an appeal having been duly made to the Local Government Board within the prescribed period after service of the notice of the apportionment, such apportionment was not completed or effectual until the decision of the Local Government Board had been made known, and that consequently the precept based on such incomplete apportionment was ab initio invalid and could not be enforced.

The appellants further contended that the respondents were the proper parties, as they were the overseers at the time the complaint was made, and that the hearing related back to the original return day, and that the justices had no jurisdiction to inquire into the validity of the precept.

The justices were of opinion that the apportionment, having been appealed against in accordance with the statute, was not completed or of any effect until the Local Government Board had confirmed it, and that consequently the precept had been made and the proceedings taken to enforce it prematurely, and they were further of opinion that they could not issue a warrant of distress against the respondents, who were not at the date of the hearing of the complaint the overseers of the parish. They accordingly dismissed the complaint subject to this case for the opinion of the Court.

Macmorran, K.C., and *Holman Gregory*, for the appellants. The fact of the overseers having gone out of office before the appeal to the Local Government Board was decided is no answer to the claim against them for the amount of the precept. They ought to have levied the rate necessary to satisfy the precept as soon as it was issued, and none the less because it was intended to appeal against the apportionment. If the apportionment had been set aside, the money or part of it might have had to be refunded to the ratepayers, but the risk of that result did not justify the respondents in holding their hand. Here the apportionment was in fact confirmed, and the precept remained a valid order which the respondents were bound to obey. The fact that they have allowed the time to go by within which they could make a rate to indemnify themselves against the appellants' claim is a matter or which they have only themselves to blame. They are personally liable for the amount. It would be most unfair upon the ratepayers of the other contributory places in the district that they should have to bear an increased proportion of the expenditure. Secondly, one of the respondents, Mr. Bellamy, is still in office as overseer. There is therefore no hardship in enforcing the claim against him, for he can make the rate now. By s. 230 of the Public Health Act the same provisions are to apply to a special expenses rate under that section as apply to a rate for the relief of the poor; and by the Poor Law Amendment Act, 1849 (12 & 13 Vict. c. 103), s. 7, where an order for the payment of money is served on one of several overseers, that order may be enforced against him alone, which suggests that in such circumstances he may make the rate himself without requiring the concurrence of the other overseers.

Avory, K.C., and *R. Cunningham Glen*, for the respondents. The respondents were under no obligation to raise the money immediately upon the issue of the precept and acted correctly in awaiting the result of the appeal. If they had raised the money and the apportionment had been set aside there would have been no means by which the ratepayers could have recovered the money paid by them. The apportionment upon which the precept was based did not become effective until the Local Government Board had given their decision. Upon that

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decision being given the appellants ought to issue a new precept to the new overseers. There is no objection to their doing so on the ground that the rate necessary to raise the money would be retrospective. The case of *Reg.* v. *Leigh Rural Council* (1) shews that where the delay on the part of the district council in calling upon the overseers of a contributory place to raise the money is due to circumstances beyond the council's control, and therefore excusable, the overseers cannot take the objection that the rate which they would have to make would be illegal as being retrospective. As to the point that one of the respondents has been re-elected to the office of overseer, that is not a ground for holding him liable, for he is only one of three overseers, and cannot make a rate by himself; overseers can only act by a majority.

LORD ALVERSTONE C.J. In this case the justices decided in August, 1908, that they would not issue distress warrants against two overseers to whom a precept had been directed in the previous October. The subject-matter of the precept in question was a contribution to certain expenses incurred under s. 229 of the Public Health Act, 1875. Under that section, where the rural authority execute any work for the common benefit of any two or more contributory places within their district they may apportion the expenses of doing the work between such contributory places. The section further provides that "The overseers of any contributory place if aggrieved by any such apportionment may, within twenty-one days after notice has been given to them of the apportionment, send or deliver a memorial to the Local Government Board stating their grounds of complaint, and the said Board may make such order in the matter as to it may seem equitable, and the order so made shall be binding and conclusive on all parties concerned." The section therefore contemplates that the apportionment will not necessarily stand ultimately in its original form, but that in the event of an appeal it will be such as the Local Government Board may order. There was an appeal to the Board, and in my judgment it is immaterial that the Board did not in fact alter the apportionment. It is enough that they might have done so. For the

(1) [1898] 1 Q. B. 836.

purpose of obtaining payment the local authority are directed by s. 230 to issue their precept to the overseers, who are to comply with such precept, the remedy for non-compliance being the same as in the case of a rate for the relief of the poor. That throws us back on 2 & 3 Vict. c. 84, by s. 1 of which contributions due from overseers to the guardians of a union may be recovered by distress. Mr. Macmorran contends that the effect of those sections is to make the overseers liable in any event if they do not obey the precept. In this case the precept was issued to two gentlemen who were overseers at the time that the precept was made. They gave notice of appeal against the apportionment and the Local Government Board directed an inquiry, and the question was eventually determined. But while those proceedings were pending there was a change of overseers, and the effect of our allowing this appeal would be to order two persons who are no longer overseers to pay the contribution at the risk of having their goods distrained for the amount. Mr. Macmorran says that at all events one of the two present overseers is also one of those to whom the precept was issued. I do not agree. It is true that he is the same individual, but he holds the office in the capacity of overseer for a different period, and may be treated for this purpose as if he were an entirely different person. In my opinion the magistrates had jurisdiction to adjourn the summons while the question of the apportionment was under appeal, and upon that matter being determined, they were right in refusing to issue their distress warrant against the former overseers who were no longer in office. With regard to the remedy of the local authority my impression is that they may direct the new overseers to obey the original precept or issue to them a new precept. But upon that I express no definite opinion. I have only to add that I think this case is practically covered by the case of *Reg.* v. *Leigh Rural Council* (1), where it was held that a rural authority who had incurred a debt had power, and were compellable by mandamus, to issue their precept to overseers to levy a rate in respect of that debt, notwithstanding that the mandamus was not applied for within the same rating year in which the debt was incurred, the delay being due to protracted

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legal proceedings, and not to any default on the part of the rural authority. The appeal must be dismissed.

BIGHAM and WALTON JJ. concurred.

Solicitors for appellants: *Law & Worsman.*

Solicitors for respondents: *Surr, Gribble & Co., for Munday, Plymouth.*

J. F. C.

1909
Feb. 8.

DUNNING *v.* SWETMAN.

Street Betting—What amounts to—Street Betting Act, 1906 (6 *Edw.* 7, *c.* 43), *s.* 1.

By s. 1 of the Street Betting Act, 1906, "Any person frequenting or loitering in streets or public places, on behalf either of himself or of any other person, for the purpose of . . . . betting" shall be guilty of an offence:—

Held, that a person who loiters in a street for the purpose of distributing handbills, stating that a third person therein named is willing to make bets upon the events and at the rates of odds therein specified, and that if the recipients of the handbills will send to such third person written offers to bet accompanied by remittances of money the offers will be accepted, is guilty of an offence under the section.

CASE stated by the stipendiary magistrate for Liverpool.

The respondent Joseph Swetman was summoned on an information charging that he on November 28, 1908, "did loiter in a certain thoroughfare, to wit Walton Breck Road, for the purpose of betting" contrary to the provisions of the Street Betting Act, 1906. (1) At the hearing of the charge the following facts were proved:—

At 2 P.M. on Saturday, November 28, 1908, three police constables saw the respondent and two other men in the said Walton Breck Road distributing handbills relating to betting to

(1) By s. 1 of the Street Betting Act, 1906, "Any person frequenting or loitering in streets or public places, on behalf either of himself or of any other person, for the purpose of bookmaking, or betting, or wagering, or agreeing to bet or wager, or paying or receiving or settling bets" shall be liable to certain penalties.

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persons going towards the Liverpool Football Ground, near the said road, where a football match was about to be played.

On the face of the handbills there appeared the following words:—"For clients who wish to pick their own matches. Please note I have arranged the following specially extended table of odds." Then followed a table of odds. "Do not be gulled by firms offering ridiculous odds, but send your investments to F. G. Morton, the man you all know, and be sure of your money." On the back of the bills there appeared in large type the words "F. G. Morton, commission agent, Flushing, Holland." Then followed a list of football matches to be played on December 5, 1908, with spaces opposite the names of the competing teams to be filled up by the person desiring to bet, and at the foot was a form—

"I enclose you herewith P. O. value £ : : in payment of above commissions which please execute.

"Name _____

"Address _____"

followed by a note, "All letters must contain postal orders and be posted not later than 2 P.M. on day of match."

The respondent and the other two men were arrested. The respondent told the police officers that a man whom he did not know had that morning handed to him at Euston Station, London, a large quantity of the said handbills and paid the respondent's return fare between London and Liverpool, giving the respondent instructions to distribute the bills in the Liverpool streets. The respondent had in his possession when arrested 300 of such bills.

The magistrate was of opinion that what the respondent had done did not come within the terms of the Street Betting Act and dismissed the information, subject to a case for the opinion of the Court.

F. Holland, for the appellant. It is enough to constitute loitering in the streets "for the purpose of betting" that the person should be there for the purpose of making offers on behalf of another person to passers by to make bets with them elsewhere. The handbills contained all the terms on which Morton was willing to bet, and on the recipient of the handbill filling it up

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and posting it together with a postal order addressed to Morton the betting contract was complete. In *Stoddart* v. *Hawke* (1) it was held that to constitute an offence under the Betting Act, 1853, which provides that no house shall be kept for the purpose of money being received by or on behalf of the keeper as the consideration for a bet, it was not necessary that the money should be intended to be received at the house itself, nor even in the United Kingdom. So here under the Street Betting Act, 1906, it is not necessary that the money, the receipt of which is required to complete the contract, should be received in the streets by the person loitering.

W. Frampton, for the respondent. The decision of the magistrate was right. The object of the Act was to prevent betting in the streets. But the respondent made no bets; he only distributed offers by a third person to make bets, the acceptances of which offers by the recipients of the handbills he had no authority nor intention to receive. The words of the section must, unless a strained interpretation is to be put upon them, mean that the offence consists in a person loitering for the purpose of betting either on behalf of himself or of some other person. But here the respondent did neither; he had no intention to bet on behalf of himself as principal nor on behalf of Morton as his agent. The words "for the purpose of betting" cannot reasonably be read as meaning "for the purpose of enabling somebody else to bet." The case of *Stoddart* v. *Hawke* (1) is not in point. To make the cases parallel it would have to be supposed that here the respondent made proposals in the streets that he himself should make bets elsewhere; and if that had been the case, it would not be disputed that he would have brought himself within the section.

LORD ALVERSTONE C.J. In this case I should be very sorry to feel obliged to indorse the ruling of the magistrate. The Street Betting Act, 1906, is a very salutary statute, and it is undesirable that we should be astute to discover means by which that statute may be evaded. It provides that "Any person frequenting or loitering in streets or public places, on behalf

(1) [1902] 1 K. B. 353.

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Lord Alverstone C.J.

either of himself or of any other person, for the purpose of bookmaking, or betting, or wagering" shall incur a penalty. The respondent was admittedly loitering in the streets for the purpose of distributing these papers, and the question is whether that comes within the prohibition of the section. Now the papers contained an offer by Mr. Morton to give certain odds, and a form to be filled up by a person who wished to bet, who was also to enclose a postal order in payment of the commission and to give his name and address. In my opinion the respondent loitered in the streets on behalf of Morton for the purpose of betting, by which I mean that he was doing that which was a substantial part of the business of betting, namely, giving a man who was invited to bet information as to the terms upon which Morton would bet and as to the means by which the bet could be negotiated. I think the case should go back to the magistrate with a direction to convict.

WALTON and JELF JJ. concurred.

Appeal allowed.

Solicitors for appellant: *F. Venn & Co., for Pickmere, Liverpool.*

Solicitor for respondent: *Percy J. H. Robinson.*

J. F. C.

1909
Jan. 21.

EVANS *v.* NICHOLL.

Highway—Light Locomotive — Vehicle under five tons in weight unladen propelled by Mechanical Power—Person employed to accompany Locomotive —Exemption from Restrictions—Locomotives on Highways Act, 1896 (59 & 60 *Vict. c.* 36), *s.* 1, *sub-s.* 1; *s.* 6, *sub-ss.* 1, 2—*Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 5, *sub-ss.* 1, 5; *s.* 17, *sub-s.* 2—*Motor Car Act*, 1903 (3 *Edw.* 7, *c.* 36), *s.* 12, *sub-s.* 1; *s.* 20, *sub-ss.* 1, 3—*Heavy Motor Car Order*, 1904, *arts.* 2, 3.

The effect of art. 3 of the Heavy Motor Car Order, 1904, is that a vehicle propelled by mechanical power, if it is under five tons in weight unladen, is a light locomotive within the meaning of the Locomotives on Highways Act, 1896, s. 1, sub-s. 1. Therefore a person cannot be convicted under s. 5, sub-s. 1 (*b*), of the Locomotives Act, 1898, for not having three men in attendance on the locomotive, inasmuch as by s. 17, sub-s. 2, of the Act of 1898 nothing in that Act is to affect light locomotives within the meaning of the Act of 1896.

Case stated by justices for the petty sessional division of Newcastle in the county of Glamorgan.

An information was laid by the respondent Nicholl which charged the appellant that on August 21, 1908, at the parish of Laleston, in the county of Glamorgan, he was the owner of a locomotive passing on the highway between Laleston and Redhill (the locomotive not being a steam roller) which had not a person employed to accompany it in such a manner as to be able to give assistance to any person with horses or carriages drawn by horses overtaking such locomotive, contrary to s. 5 of the Locomotives Act, 1898. (1)

At the hearing the following facts were proved or admitted.

On the day in question a locomotive owned by the appellant was passing on the highway between Laleston and Redhill, and there were two persons only in charge of the locomotive, both of whom were on the front part of it.

There was not any person employed to accompany the locomotive in such a manner as to be able to give assistance to any person with horses or carriages drawn by horses overtaking the locomotive.

(1) See note on p. 784, post.

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The locomotive was propelled by steam and weighed 4 tons 15 cwts. unladen and was not used for the purpose of drawing more than one vehicle. Smoke was emitted from the locomotive, which for the purposes of the case was to be assumed to be due to a temporary or accidental cause.

The locomotive was registered in the county of Southampton as a heavy motor car weighing unladen 4 tons 15 cwts.

It was contended on behalf of the appellant that though the vehicle was a locomotive it was a light locomotive, and that the provisions of s. 5 of the Locomotives Act, 1898, did not apply, inasmuch as although s. 1 of the Locomotives on Highways Act, 1896, defined light locomotives as vehicles propelled by mechanical power if under three tons in weight unladen, s. 6 of that Act and s. 12 of the Motor Car Act, 1903, empowered the Local Government Board to make provisions with respect to locomotives on highways and their construction and to increase the maximum weight mentioned in s. 1 of the Locomotives on Highways Act, 1896; that the Local Government Board by art. 3 of the Heavy Motor Car Order, 1904, had increased the maximum weight from three tons to five tons, and that, inasmuch as the regulations contained in the order of 1904 had full effect notwithstanding anything in any Act, whether general or local, or any by-laws or regulations made thereunder, s. 1 of the Locomotives on Highways Act, 1896, which defined a light locomotive, should be read as if the word "five" were substituted for the word "three" therein.

It was contended for the respondent that art. 3 of the Heavy Motor Car Order, 1904, was expressed to be made "notwithstanding anything contained in the Motor Car Acts, 1896 and 1903," and did not profess to apply to the Act of 1898, and that the article did not in terms exempt the heavy motor cars referred to from any restrictions and penalties imposed by that or any Act, nor did it in terms alter the definition of a light locomotive; it merely stated that heavy motor cars might be used on a highway.

The justices decided against the contention of the appellant and held that art. 3 of the Heavy Motor Car Order, 1904, did not alter the definition of a light locomotive so as to exempt

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light locomotives from the restrictions put upon the use of locomotives by the Act of 1898, and that s. 5 of that Act applied, and they fined the appellant the sum of 2*l.*, including costs.

The question for the opinion of the Court was whether the justices were right in law in so holding.

J. A. Simon, K.C., and *W. Frampton*, for the appellant. The vehicle weighs $4\frac{3}{4}$ tons unladen. It is therefore a heavy motor car, but a light locomotive. Under s. 1 of the Locomotives on Highways Act, 1896, the limit of weight of a vehicle which was free from restrictions was three tons, and the vehicle exempted under that Act was called a light locomotive. Sect. 6, sub-s. 1, of the Act of 1896 gave power to the Local Government Board to make by-laws. Sect. 12 of the Motor Car Act, 1903, gave the Local Government Board power to increase the maximum weight of three tons for a light locomotive fixed by the Locomotives on Highways Act, 1896, and the Board accordingly, by art. 3 of the Heavy Motor Car Order, 1904, increased the maximum weight of the exempted vehicles from three to five tons. The result is that the vehicle, if under five tons unladen, may under s. 1 of the Locomotives on Highways Act, 1896, be used on highways as an exempted vehicle. Sect. 17, sub-s. 2, of the Locomotives Act, 1898, excludes from the ambit of that statute a light locomotive within the Locomotives on Highways Act, 1896. Sect. 20 of the Motor Car Act, 1903, and art. 2 of the Heavy Motor Car Order, 1904, shew that a vehicle may be a heavy motor car but a light locomotive within the meaning of s. 1, sub-s. 1, of the Locomotives on Highways Act, 1896.

The respondent did not appear.

LORD ALVERSTONE C.J. This case requires to be carefully considered, but when the statutes bearing upon it are read chronologically there is no difficulty in construing them. Before the year 1896 there were a number of statutes, to which it is unnecessary to refer in detail, which controlled the use of locomotives on highways in certain respects, as, for instance, by the requirement that a person should walk in front with a flag.

The Locomotives on Highways Act, 1896, excluded from the operation of those Acts any vehicle propelled by mechanical power under three tons in weight unladen which was so constructed that no smoke or visible vapour was emitted therefrom, except from any temporary or accidental cause. If the vehicle be not so constructed it is still subject to the enactments mentioned in the schedule to the Act of 1896, and convictions have been upheld in this Court for emitting smoke in the case of vehicles which would otherwise be exempted and therefore light locomotives within the meaning of the statute. If they are so constructed that no smoke or visible vapour is emitted, and they are under three tons in weight unladen, s. 1 of the Locomotives on Highways Act, 1896, provides that the enactments in the schedule to that Act and any other enactment restricting the use of locomotives on highways shall not apply to them, and vehicles so exempted, whether locomotives or drawn by locomotives, are in the Act referred to as light locomotives. After the Locomotives on Highways Act, 1896, was passed it was found necessary to amend the enactments restricting the use of locomotives on highways, owing partly to the use of motor cars and partly to the frequent use of other vehicles propelled by mechanical power on highways. Accordingly the Locomotives Act, 1898, was passed. It is obvious from the language of that statute (under s. 5 of which the appellant was summoned) that it would not apply to motor cars in the ordinary sense, and therefore it was provided by s. 17, sub-s. 2, that "nothing in this Act shall affect light locomotives within the meaning of the Locomotives on Highways Act, 1896." In other words, it was recognized by the Act of 1898 that light locomotives within the Act of 1896 did not require to have two persons employed in driving or attending to them, as required by s. 5 of the Act of 1898, or to have a third person employed to accompany the locomotive in order to give assistance to any person with horses or carriages drawn by horses meeting or overtaking the locomotive, provided that the light locomotive did not exceed three tons in weight. By s. 6 of the Locomotives on Highways Act, 1896, it was provided that the Local Government Board might make regulations with respect to the use of light

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locomotives on highways, and their construction and the conditions under which they might be used, and certain regulations were made under that statute. Subsequently it was desired to alter the limit of weight, and accordingly it was provided by the Motor Car Act, 1903, s. 12, that "the Local Government Board, by regulations made under s. 6 of the principal Act . . . . may, as respects any class of vehicle mentioned in the regulations, increase the maximum weights of three and four tons mentioned in section 1 of that Act, subject to any conditions as to the use and construction of the vehicle which may be made by the regulations." That section also provided that the Local Government Board might make regulations as to the speed of cars above two tons in weight. In other words, the Legislature said that the Act of 1896 should not apply only to light locomotives which are under three tons in weight, but that the Local Government Board might, if it thought fit, by regulations increase the maximum weight. It was also provided by s. 20, sub-s. 3, of the Act of 1903 that that Act might be cited together with the Locomotives on Highways Act, 1896, as the Motor Car Acts, 1896 and 1903. It follows that light locomotives under the Act of 1896 have now become motor cars with power to the Local Government Board to increase the maximum weight. The Local Government Board by art. 3 of the Heavy Motor Car Order, 1904, provided that, "notwithstanding anything in the Motor Car Acts, 1896 and 1903, and except as is otherwise provided in the regulations, a heavy motor car may be used on a highway if the weight of the heavy motor car unladen does not exceed five tons," and by art. 2 "the expression 'heavy motor car' means a motor car exceeding two tons in weight unladen." For certain purposes the regulations have drawn a distinction between motor cars which are light and motor cars which are between two tons and five tons in weight, which are termed heavy motor cars, but, notwithstanding that, they are still light locomotives under the Act of 1896. It is, in my opinion, clear that a light locomotive under the Act of 1896 which by the express terms of the Act of 1898 is exempted from the provisions of that Act has now become a motor car which may exceed three tons in weight provided it is under the maximum weight of five tons. The

justices were wrong, and the appeal must be allowed and the conviction quashed.

BIGHAM J. I agree. I think that the effect of art. 3 of the Heavy Motor Car Order, 1904, is to put motor cars weighing less than five tons in the same position as motor cars weighing less than three tons were under the Locomotives on Highways Act, 1896. If that is the true construction, they are not affected by the Locomotives Act, 1898, and the third person to accompany them is not required.

WALTON J. I am of the same opinion.

Appeal allowed.

Solicitor for appellant: *Sydney Morse.*

NOTE.—Locomotives on Highways Act, 1896, s. 1, sub-s. 1: "The enactments mentioned in the schedule to this Act, and any other enactment restricting the use of locomotives on highways and contained in any public general or local and personal Act in force at the passing of this Act, shall not apply to any vehicle propelled by mechanical power if it is under three tons in weight unladen, and is not used for the purpose of drawing more than one vehicle (such vehicle with its locomotives not to exceed in weight unladen four tons), and is so constructed that no smoke or visible vapour is emitted therefrom except from any temporary or accidental cause; and vehicles so exempted, whether locomotives or drawn by locomotives, are in this Act referred to as light locomotives.

"Provided that—

"(*a*) The council of any county or county borough shall have power to make byelaws preventing or restricting the use of such locomotives upon any bridge within their area, where such council are satisfied that such use would be attended with damage to the bridge or danger to the public."

Sect. 6, sub-s. 1: "The Local Government Board may make regulations with respect to the use of light locomotives on highways, and their construction, and the conditions under which they may be used."

Sub-s. 2: "Regulations under this section may, if the Local Government Board deem it necessary, be of a local nature and limited in their application to a particular area, and may, on the application of any local authority, prohibit or restrict the use of locomotives for purposes of traction in crowded streets, or in other places where such use may be attended with danger to the public.

"All regulations under this section shall have full effect notwithstanding anything in any other Act, whether general or local, or any byelaws or regulations made thereunder.

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"Every regulation purporting to be made in pursuance of this section shall be forthwith laid before both Houses of Parliament."

Locomotives Act, 1898, s. 5, sub-s. 1: "When a locomotive is passing on any highway—

(*a*) two persons shall be employed in driving or attending to the locomotive; and

(*b*) in the case of any locomotive not being a steam roller another person shall be employed to accompany the locomotive in such a manner as to be able to give assistance to any person with horses or carriages drawn by horses meeting or overtaking the locomotive, and shall give such assistance when required; and

(*c*) when a locomotive is drawing more than three waggons, another person shall be employed for the purpose of attending to the waggons . . . ."

Sub-s. 5: "If any of the provisions of this section are not complied with in the case of any locomotive, the owner of the locomotive shall be liable for each offence, on summary conviction, to a fine not exceeding ten pounds."

Sect. 17, sub-s. 2: "Nothing in this Act shall affect light locomotives within the meaning of the Locomotives on Highways Act, 1896."

Motor Car Act, 1903, s. 12, sub-s. 1: "The Local Government Board, by regulations made under section six of the principal Act" (i.e., the Locomotives on Highways Act, 1896), "may, as respects any class of vehicle mentioned in the regulations, increase the maximum weights of three tons and four tons mentioned in section one of that Act, subject to any conditions as to the use and construction of the vehicle which may be made by the regulations."

Sub-s. 2: "The power of the Local Government Board to make regulations under section six of the Locomotives on Highways Act, 1896, shall, as respects motor cars exceeding two tons in weight unladen, include a power to make regulations as to speed."

Sect. 20, sub-s. 1: "In this Act the expression 'motor car' has the same meaning as the expression 'light locomotive' has in the principal Act, as amended by this Act, except that, for the purpose of the provisions of this Act with respect to the registration of motor cars, the expression 'motor car' shall not include a vehicle drawn by a motor car."

Sect. 20, sub-s. 3: "This Act may be cited as the Motor Car Act, 1903; and the Locomotives on Highways Act, 1896, and this Act may be cited together as the Motor Car Acts, 1896 and 1903."

By the Heavy Motor Car Order, 1904—after reciting that by the Motor Car Acts, 1896 and 1903, provision was made with respect to the use of motor cars on highways, and that in compliance with s. 1 of the Locomotives on Highways Act, 1896, which in the Motor Car Act, 1903, and in this order is referred to as "the principal Act," a motor car must be under three tons in weight unladen, and that in pursuance of s. 6 of the principal Act and of s. 12 of the Motor Car Act, 1903, the Local Government Board are empowered to make regulations with respect to the use of motor cars on highways, and their construction and the conditions under which they may be used—the Local Government Board made the following regulations, to come into force on March 1, 1905:—

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Art. 2: "In the regulations" (i.e., the regulations in this order)—"The expression 'heavy motor car' means a motor car exceeding two tons in weight unladen."

Art. 3: "Notwithstanding anything in the Motor Car Acts, 1896 and 1903, and except as is otherwise provided in the regulations, a heavy motor car may be used on a highway if the weight of the motor car unladen does not exceed five tons, or if the weight of the heavy motor car unladen with the weight of an unladen vehicle drawn by it does not exceed six and a half tons."

J. E. A.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D. 1908 *June* 18.

C. A. 1909 *Jan.* 27, 28.

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Insurance (Marine)—"Pirates," Meaning of in Policy—Seizure of Goods by Political Malcontents—"Warranted free of capture, seizure, and detention, piracy excepted."

Goods were shipped upon a vessel for carriage from a place at the mouth of the Amazon to a place far inland upon a tributary of a tributary of that river, situated in a remote territory belonging to Bolivia on the boundary between that country and Brazil. These goods were insured for the voyage by a policy in the form of a marine policy against, among other risks usually specified in such a policy, "pirates" and "all other perils" that should come to the hurt, detriment, or damage of the subject-matter of insurance. The policy contained the following clause: "Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war." The goods insured consisted of provisions and stores which belonged to the Bolivian Government, and were intended for Bolivian troops engaged in establishing the authority of that Government in the before-mentioned territory. Certain malcontents, mostly Brazilians, who were desirous that the authority of the Bolivian Government should not be established there, had fitted out an expedition which ascended the Amazon in armed vessels for the purpose of resisting the Bolivian troops and establishing an independent republic in the before-mentioned territory. Those on board one of these vessels stopped the vessel on which the goods insured were shipped and seized those goods. In an action on the policy claiming as for a loss through pirates:—

Held, affirming the decision of Pickford J., that, even assuming that

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the acts of those who seized the goods came within the legal definition of piracy for some purposes, the word "pirates," as used in the policy, must be construed in its popular sense, and in that sense it meant persons who plunder indiscriminately for their private gain, not persons who simply operate against the property of a particular State for a public political end, and, therefore, there had not been a loss through "pirates" within the meaning of the policy.

Held, also, that, having regard to the terms of the warranted free clause, the seizure of the goods could not be treated as coming within the general words "all other perils" as being ejusdem generis with piracy.

ACTION tried by Pickford J. without a jury.

The action was brought by the Republic of Bolivia on a policy of insurance in the form of a marine policy issued by the defendants upon goods belonging to the Bolivian Government shipped on the steamship *Labrea* for carriage from Para at the mouth of the Amazon to Puerto Alonzo and (or) other places on the river Acre and (or) in that district.

The risks covered by the policy were thus described therein: "And touching the adventures and perils which the company is made liable unto or is intended to be made liable unto by this assurance, they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever; barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this assurance or any part thereof."

The policy contained the following clause:—"Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war."

The following statement of the facts is for the most part taken from the judgment of the learned judge:—

Puerto Alonzo, the *Labrea's* port of destination, is upon the river Acre, a tributary of a tributary of the Amazon, far inland in territory belonging to the Republic of Bolivia, known as Colonias, and subsequently as the Free Republic of El Acre.

During the course of the voyage insured the *Labrea* was stopped at a place called Caqueta, which is upon the river Acre, by an armed vessel called the *Solimoes*, which had been fitted out by one Carvalho and his associates under the circumstances after mentioned. Those on board the *Solimoes* seized and carried away the whole of the goods insured on board the *Labrea*.

In 1867, by a treaty between Brazil and Bolivia, the territory of Colonias was either ceded or assured to Bolivia. There was, however, no demarcation of the frontier until 1898, when a commission of delimitation was appointed by the two Governments and a frontier line was fixed, called the Cunha Gomes line. Apparently Bolivia had not before 1898 exercised any effective jurisdiction in the territory, but there was valuable property there, rubber of considerable value being produced, and both Brazilians and Bolivians, but chiefly Brazilians, had settled there, and traded in rubber and other things. What the exact nature of the government of that territory was in those days was not quite clear; probably there was not much government. There was a custom-house at Manaos, and another at Para, at the mouth of the Amazon, and customs were exacted in respect of goods coming down the Amazon from Colonias, but there was no Bolivian custom-house or government set up there, and, if there were any government exercised at all, it was exercised by magistrates appointed by the Brazilian Government, some of whom might have been stationed on the Bolivian side of the Cunha Gomes line. After the demarcation of the frontier was effected, the Bolivian Government were minded to take effective possession of the territory and to establish proper Bolivian government there, and the first step they took was to establish a custom-house at or near Puerto Alonzo; but the representatives sent there were turned out and one of them killed by certain persons, chiefly Brazilians, who were not desirous that there should be a Bolivian government there, and had joined in establishing there what they called the Free Republic of El Acre. About the same time as the establishment of the custom-house at Puerto Alonzo and the establishment of the Free Republic of El Acre, the Bolivian Government sent an expedition from La Paz,

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the capital of Bolivia, under the command of one Munoz, in order to take possession of the territory. It was a long and difficult march from La Paz, and the expedition was several months on the way, but it did eventually arrive within the territory, and then the Free Republic of El Acre, for a time at least, disappeared. Some of the republicans crossed the Brazilian frontier, and in Brazilian territory set themselves to work either to re-establish the original Free Republic of El Acre or a government of their own—at any rate to oust the Bolivian Government. The Brazilians near the frontier line seemed to have been very much in sympathy with the republic, or at any rate those persons who were resisting the establishment of the Bolivian Government. That clearly appeared from a speech of the Governor of Manaos which was read in the course of the trial. The Bolivian expedition, although it had arrived at and taken possession of the territory, was in a rather difficult position; it was a very long way from the capital, and it was very difficult to supply the expedition with provisions and stores. They could not very well get them from the Brazilian side, because the Brazilians were not well affected; and it was very difficult to get them from the Bolivian capital in consequence of the distance. Accordingly it was arranged between the Brazilian and Bolivian Governments that the expedition should be provisioned by sending stores and provisions up the Amazon from Para, and this was done on the *Labrea*, and it was in connection with the insurance of those provisions that the question in this case arose. The before-mentioned Carvalho had been concerned in the establishment of the Free Republic of El Acre, and was among those who were desirous that the Bolivians should not establish any stable government in Acre; and he started or assisted in a movement either for the re-establishment of the Free Republic of El Acre or the establishment of another republic on his own account. In pursuance of this design he and others fitted out an expedition in Para to intercept the stores to be sent up for the Bolivian force, and he intended to intercept them at Puerto Alonzo, and, having got possession of the stores, to attack the Bolivian expedition and to make himself master of the place. With that object they fitted out either two or three vessels, which

were armed, one of them, the *Solimoes*, being fitted with a quick-firing gun. This expedition went up the Amazon and got somewhere into the neighbourhood of Puerto Alonzo, and there they stopped a number of steamers, but they did not take goods from any of them, when they ascertained that they were not carrying goods for the Bolivian Government. When, however, the *Labrea* arrived, they stopped her, and, finding that she was carrying goods for the Bolivian Government, they took possession of her. The *Solimoes* was flying a flag which the persons on board the *Labrea* thought to be the flag of El Acre. Those on the *Solimoes* took the stores and then crossed the Bolivian frontier and attacked, or were attacked by, the Bolivian force, with the result that the revolutionary force was defeated and disappeared. It was contended for the plaintiffs that the acts of those on board the *Solimoes* came under the head of piracy.

Scrutton, K.C., and *F. D. Mackinnon*, for the plaintiffs.
J. A. Hamilton, K.C., and *Leck*, for the defendants.

1908. June 18. PICKFORD J., after stating the facts substantially as above, proceeded as follows: The question is whether, in these circumstances, the loss occurred by piracy. Those on board the *Solimoes* professed, at any rate, to act on behalf of the republic which they wanted to re-establish, or were seeking to establish, and they were flying a flag which was supposed to be that of El Acre. The plaintiffs say that the loss was by piracy, and their counsel have referred me to several definitions of piracy, some given by writers on international law and some by writers on criminal law. I am not sure that the definitions so given are necessarily in point on the question as to the meaning of the word in a policy of insurance. One definition which was relied on was that given in Russell on Crimes, 6th ed., vol. i. p. 260, and which is as follows: "The offence of piracy at common law consists in committing those acts of robbery and depredation upon the high seas which if committed upon land would have amounted to felony there." It was said that these goods were forcibly stolen, that there was a felony, and that the offence came within that definition, because "the high seas"

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there mentioned must be extended to all waters over which there was Admiralty jurisdiction. In *Reg.* v. *Anderson* (1) the jurisdiction of the Admiralty was held to extend to a ship some distance up the river Garonne, and therefore it is argued that this place was within the jurisdiction of the Admiralty. As to that, all I will say at the moment is that I am not satisfied that an illegal act by Brazilians in a place situated upon a tributary of a tributary of the Amazon, that act consisting in taking from a Brazilian ship goods belonging to the Bolivian Government, comes within the jurisdiction of the British Admiralty, but, in the view I take of the case, it is not necessary to decide that point. I was also referred to the definitions of piracy given in Hall's International Law and Oppenheim's International Law. The definition given by the latter writer does not seem to be of much assistance to the plaintiffs, as he says that the offence must be committed on the high seas. The definition given by Hall is, no doubt, very wide, but, as I have already said, I am not at all sure that what might be piracy in international law is necessarily piracy within the meaning of the term in a policy of insurance. One has to look at what is the natural and clear meaning of the word "pirate" in a document used by business men for business purposes; and I think that, looking at it in that way, one must attach to it a more popular meaning, the meaning that would be given to it by ordinary persons, rather than the meaning to which it may be extended by writers on international law.

This policy was for a river transit up the Amazon, and it was contended that the word must be read in connection with that, and that the people who seized the goods insured must be considered to be pirates in respect of that voyage, although they were not upon the open sea, and although they might not be held to be within the jurisdiction of the Admiralty. I will assume in favour of the plaintiffs—although I am not sure that it is a correct assumption—that, if those people had in other respects the attributes which ought to be attached to pirates in the case of a policy of marine insurance, I ought to hold that the loss in this case occurred by piracy, although what took place was not on the open sea and not within the jurisdiction of the

(1) (1868) L. R. 1 C. C. 161.

Admiralty. The facts shew that there was an organized expedition for the purpose of establishing a government in a particular territory, and they also shew that interference with property was only intended, and only effected, so far as was necessary for that object, and not for the plundering of every one indifferently. It was said that Carvalho's motives were private and personal motives. I do not think I can go into that. Probably in every revolution it is not possible to say that all the persons concerned acted simply from disinterested motives. I can only look at what was done. Did that constitute those people pirates within the meaning of the policy? I do not think it did. As I have said, I have to look at the more popular or business meaning of the word "piracy," and I do not think that can be better expressed than it is in Hall's International Law, 5th ed. p. 259, where it is said: "Besides, though the absence of competent authority is the test of piracy, its essence consists in the pursuit of private, as contrasted with public, ends. Primarily the pirate is a man who satisfies his personal greed or his personal vengeance by robbery or murder in places beyond the jurisdiction of a State. The man who acts with a public object may do like acts to a certain extent, but his moral attitude is different, and the acts themselves will be kept within well-marked bounds. He is not only not the enemy of the human race, but he is the enemy solely of a particular State." That I think expresses what I have called the popular or business meaning of the word "pirate"; and I find that several, though not all, of the definitions cited in the note on p. 260 of the same work bear out that idea. No doubt there are definitions which do not embody that idea, but that I think is the common and ordinary meaning; a man who is plundering indiscriminately for his own ends, and not a man who is simply operating against the property of a particular State for a public end, the end of establishing a government, although that act may be illegal and even criminal, and although he may not be acting on behalf of a society which is, to use the expression in Hall on International Law, politically organized. Such an act may be piracy by international law, but it is not, I think, piracy within the meaning of a policy of insurance; because, as I have already said, I think you have to

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attach to piracy a popular or business meaning, and I do not think, therefore, that this was a loss by piracy. There is another passage in Hall on International Law, at p. 262, which throws some light upon the matter. Speaking of depredations committed at sea upon the public or private vessels of a State, or descents upon its territory from the sea by persons not acting under the authority of any politically organized community, notwithstanding that the objects of such persons may be professedly political, Hall says that such acts are piratical within the meaning of the term in international law, but he goes on to say this: "Sometimes they are wholly political in their objects and are directed solely against a particular State, with careful avoidance of depredation or attack upon the persons or property of the subjects of other States. In such cases, though the acts done are piratical with reference to the State attacked, they are for practical purposes not piratical with reference to other States, because they neither interfere with nor menace the safety of those States, nor the general good order of the seas. It will be seen presently that the difference between piracy of this kind and piracy in its coarser forms has a bearing upon usage with respect to the exercise of jurisdiction." I think that "piracy" in a policy of marine insurance means piracy in what is called by Hall its coarser sense. I therefore come to the conclusion that these goods were not lost by piracy. For these reasons I think there must be judgment for the defendants.

The plaintiffs appealed.

1909. Jan. 27, 28. *Scrutton, K.C.*, and *F. D. Mackinnon*, for the plaintiffs. There was in this case a loss through "pirates" within the meaning of the policy. "Piracy" is not confined to depredations upon the open sea. It includes depredations committed on land by depredators landing from the sea. In this case the expedition organized by Carvalho started from a point at the mouth of the Amazon, which is so wide there as to be practically an arm of the sea. The voyage for which the goods were insured was from that point to the place of destination upon the river Amazon and tributaries thereof, and some meaning must be given to the

word "pirates" as used in relation to it. "Piracy" is merely robbery on the high seas or any waters within the jurisdiction which belonged to the Lord High Admiral: see the definition of "piracy" given by Sir Charles Hedges, Judge of the Admiralty Court, in *Rex* v. *Dawson* (1), and approved of by the Judicial Committee of the Privy Council in *Attorney-General of Hong Kong* v. *Kwok-a-Sing*. (2) In a policy which relates to a voyage on a river the word "piracy" must be construed as covering any acts which, if done on the high seas, would constitute piracy: see *Boehm* v. *Combe*. (3) In *Reg.* v. *Anderson* (4) it was held that the Admiralty jurisdiction extended to a British vessel up the river Garonne, ninety miles from the sea. It is contended that the acts of Carvalho and his associates amounted to piracy jure gentium, an offence which might be dealt with by any nation, although in practice, no doubt, only the nation whose property is attacked would interfere in such cases. But, even if that is not so, the term "piracy," as used in this policy, cannot be confined to piracy jure gentium. The policy being made in England must be construed according to English law, and the word "piracy," as used in it, must therefore be taken to include anything that would come within the meaning of that term for the purposes of English law, as to which see *Palmer* v. *Naylor* (5) and *Nesbitt* v. *Lushington*. (6) For the purposes of this policy a seizure of the goods on water which amounted to a robbery would be piracy. The seizure of these goods amounted to robbery. Those who seized them cannot, under the circumstances, be considered as belligerents, and it would seem that they must have seized the goods either in the capacity of belligerents or of robbers. In Oppenheim's International Law, vol. ii. p. 86, it is stated to be a customary rule of the law of nations that insurgents can be recognized as a belligerent power, provided they are in possession of a certain part of the territory of the legitimate Government and have set up a government of their own, and conduct their armed contention with the legitimate Government according to the laws and usages of war. None of those conditions were

(1) (1696) 13 St. Tr. 451.
(2) (1873) L. R. 5 P. C. 179.
(3) (1813) 2 M. & S. 172.
(4) L. R. 1 C. C. 161.
(5) (1854) 10 Ex. 382.
(6) (1792) 4 T. R. 783.

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fulfilled here. At the time when the seizure took place, those who seized the goods were not in possession of any part of Bolivian territory; they had not set up a government of their own; and they could not be said to be conducting their contention with the Bolivian Government in accordance with the laws and usages of war. They had not been recognized as belligerents by any power. They were mere filibusters. In Hall on International Law, 5th ed. p. 262, it is said that descents upon the territory of a State from the sea by persons not acting under the authority of any politically organized community are piratical, although the object of those persons may be professedly political. Here the acts of Carvalho and his confederates were not done by the authority of any politically organized community. If the seizure in this case does not come within the term "piracy" as used in this policy, it comes within the general words "all other perils, losses, and misfortunes," &c., which must be construed as covering anything ejusdem generis with the specific risks enumerated, and therefore anything ejusdem generis with piracy. [They also cited *Rex* v. *Allen* (1); *In re Tivnan* (2); *Dean* v. *Hornby* (3); *Thames and Mersey Marine Insurance Co.* v. *Hamilton, Fraser & Co.* (4)]

J. A. Hamilton, K.C., and *Leck*, for the defendants. By the terms of the policy, unless the seizure of these goods amounted to piracy, the defendants are not liable. It is not sufficient to say that the acts done were similar to piracy, because the insurance is "warranted free of capture, seizure, and detention, ... piracy excepted"; and therefore, unless the seizure amounts to piracy, it does not come within the policy. Matters which are excluded by the warranted free clause cannot be brought within the operation of the policy under the general words "all other perils, losses," &c. So it is irrelevant to consider whether the acts in question resemble piracy. The question therefore is whether they amount to piracy. Pickford J. was right in saying that what had to be considered was the meaning of "pirates" in the policy. But, indirectly, the consideration of the general or any particular

(1) (1837) 1 Moo. C. C. 494.
(2) (1864) 5 B. & S. 645.
(3) (1854) 3 E. & B. 180.
(4) (1887) 12 App. Cas. 484, at p. 494.

meaning of the term "piracy" for other purposes may assist in determining the meaning of that term in the policy. To call the acts here in question from any point of view "piracy" appears to be fantastic. They want certain essential characteristics of piracy. It is a characteristic of a pirate that he should be hostis humani generis: see definition of a pirate by Lord Coke, 3 Inst. 113. In *Palmer* v. *Naylor* (1) it was not really held that the acts done by the coolies in seizing the ship were actual piracy, but that they were ejusdem generis therewith; but on the facts it might have been said that the coolies were acting as hostes humani generis, for they by open violence seized a ship, and assumed the navigation of her upon the high seas, and were ready to defend themselves against all authority for the purpose of escape. Throughout all the cases in which acts have been held to be piracy the underlying test has been that for the time the actors were criminals at war with society in general. Those who seized these goods cannot be said to have been at war with society in general. They may be called rebels or insurgents, offenders against their own Government, which was at peace with Bolivia, or against the Bolivian Government, but not enemies of the human race. Again, it is another characteristic of piracy that it is an exception from the general rule by which the jurisdiction of Governments is confined to acts done within their respective territories, and is an offence repressible by and cognizable in the Courts of any country, because all nations are interested in its suppression. It cannot seriously be suggested that the acts in question would be cognizable as piracy in an English Court. Again, it is above all things essential to the character of a pirate that he should be an indiscriminate plunderer for his own benefit. There is nothing in piracy of a political character. Rioters or insurgents committing acts of violence on some political ground against a particular Government are not pirates. The persons who seized these goods were acting in the character of belligerents, carrying on war, on a very small scale it is true, against the Bolivian Government in a remote and ill-organized territory of that Government, for the purpose of maintaining, or at any rate re-establishing,

(1) 10 Ex. 382.

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the independent republic of El Acre. The case was rather that of a "civil commotion" than of piracy. Again, it is a characteristic of piracy that it should be committed on the high seas or should start from the high seas. The term cannot by any stretch of language be applied to what was done, not on the main stream of the Amazon, but on a tributary of a tributary of that river, at a place more than a thousand miles inland. In Hall's International Law, 5th ed. p. 257, it is said that acts of piracy must be done under circumstances which render it impossible for any State to be held responsible for them. That cannot be said to have been the case here. The Brazilian Government were responsible for the suppression of an expedition starting from their territory for the purpose of committing such acts.

F. D. Mackinnon, in reply.

VAUGHAN WILLIAMS L.J. In my opinion this appeal fails. I adopt what Pickford J. says as to the meaning of "piracy" in the following passage of his judgment: "I do not think that can be better expressed than it is in Hall's International Law, 5th ed. p. 259, where it is said: 'Besides, though the absence of competent authority is the test of piracy, its essence consists in the pursuit of private as contrasted with public ends. Primarily the pirate is a man who satisfies his personal greed or his personal vengeance by robbery or murder in places beyond the jurisdiction of a State. The man who acts with a public object may do like acts to a certain extent, but his moral attitude is different, and the acts themselves will be kept within well-marked bounds. He is not only not the enemy of the human race, but he is the enemy solely of a particular State.' That I think expresses what I have called the popular or business meaning of the word 'pirate,' and I find that several, though not all, of the definitions cited in the note on p. 260 of the same work bear out that idea. No doubt there are definitions which do not embody that idea, but that I think is the common and ordinary meaning; a man who is plundering indiscriminately for his own ends, and not a man who is simply operating against the property of a particular State for a public end, the end of

establishing a government, although that act may be illegal and even criminal, and although he may not be acting on behalf of a society which is, to use the expression in Hall on International Law, politically organized. Such an act may be piracy by international law, but it is not, I think, piracy within the meaning of a policy of insurance; because, as I have already said, I think you have to attach to 'piracy' a popular or business meaning, and I do not think, therefore, that this was a loss by piracy." I adopt that passage as the basis of my judgment.

It was said by the plaintiffs that the learned judge has given no specific definition of what he held to be the meaning of "piracy" in this particular policy. I do not agree. I think that in the words which I have already read the learned judge has given a most plain definition, both by affirmative words and by words of exclusion. He expressly disclaimed deciding what was the meaning of piracy in international law. He referred to the particular policy and said that the word "piracy," as used there, meant piracy in a popular or business sense, and then stated what he considered that to be. As far as the facts were concerned, if that was the true meaning, it was for the learned judge to construe the document and find the facts, and then decide whether the facts so found came within the definition which as a matter of law he had given. If his definition was right, the facts in my opinion did not constitute piracy within it. In this case the facts were not really in dispute at all.

Having said that, I ought now to say a few words on the policy itself. The words of the policy which describe the risks insured against are these: "And touching the adventures and perils which the company is made liable unto or is intended to be made liable unto by this assurance, they are of the seas, men-of-war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and counter-mart, surprisals, takings at sea, arrests, restraints, and detainments of all kings, princes, and people of what nation, condition, or quality soever; barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this assurance or any part thereof." The enumeration of risks which I have read

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Vaughan Williams L.J.

includes the word "pirates." The first contention of the plaintiffs was that their loss was covered by the word "pirates." I think it was not so covered for the reasons already given. But then it was said that, even if the facts did not amount to piracy, strictly speaking, yet the general words "all other perils, losses, and misfortunes," &c., so plainly included matters which, though not piracy, were matters ejusdem generis therewith, that we ought to say that the loss of the plaintiffs was covered by the policy. As to that, there is this difficulty. The policy contains a warranty clause in the following terms: "Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war." It seems to me that, although piracy is excepted from the warranty, that clause shews that it is piracy only, and not things like piracy, which is excluded from it. I say this because there are several matters, some of them being like piracy, which are left part of the subject-matter of the warranty, such as riots, civil commotions, hostilities, or warlike operations. Under those circumstances I think it is impossible for the plaintiffs to rely on the ejusdem generis doctrine as helping them, because amongst the things which are left within the warranty clause are "riots" and "civil commotions," which are an extremely close description of the very events which have taken place in this case, and which were prima facie not piracy, but matters ejusdem generis. It is not admissible to bring in under the general words, as being ejusdem generis with piracy, things of the description excluded by the warranty.

Pickford J. has decided this case, expressly leaving out of determination all definitions of piracy for purposes of either international or English municipal law. He has decided the case merely on the meaning of the word "piracy" in this particular policy. I wish, however, to say for myself, though we have not got to decide that question, in case of any difficulty hereafter as to the meaning of the judgment of Pickford J. or of that of the Court of Appeal, that in my opinion there is no pretence for calling what in this case had happened on the borders of Brazil and Bolivia piracy. In the first place, I do

not think that the place where these events happened, which was not on the Amazon where it ran into the sea, but on a branch river running into another branch river of the Amazon, was a place where a piracy could be committed. After all, this was a policy of marine insurance, and the loss sought to be covered was alleged to be loss by piracy, or something ejusdem generis. Whatever the definition of piracy may be, in my opinion piracy is a maritime offence, and what took place on this river, running partly in Brazil and partly in Bolivia, far up country, did not take place on the ocean at all. That distant place was not the theatre on which piracy could be committed. It is a region which cannot be said to be, like the ocean, under the jurisdiction of no particular power. It was under the jurisdiction of either Brazil or Bolivia. That part of the river is not the highway of the world, where ships of all nations can go protected only by the law of nations. It is a place where, if any ships go, they go, not on the sea, but on a river running in occupied territory which is under the government of a specific nation which has jurisdiction there. I wish to add one word in relation to the distinction between piracy jure gentium and piracy by municipal law. Whatever other limitation there might be in this policy, it could, in my opinion, only extend to piracy jure gentium, and not to robbery on a river which at that point had been running through land for a long distance and had to run for a further distance, and both banks of which there belonged to Bolivia. In my opinion the judgment of Pickford J. was quite correct, and this appeal must be dismissed.

FARWELL L.J. I also am of opinion that the conclusion arrived at by Pickford J. is correct. I desire to express no opinion upon the point with which my brother Vaughan Williams has dealt in the last part of his judgment, namely, whether the acts in question were piracy in the abstract. I neither dissent from nor assent to what the Lord Justice has said on that subject. If it had been necessary to decide that question for the purposes of the present case, I should have desired to consider the matter further. I think that the question which we have to consider here is whether in this policy the meaning of the word "piracy," contrasted

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Farwell L.J.

as it is with the words "riots, civil commotions, hostilities, and warlike operations, whether before or after declaration of war," can possibly be extended so as to comprehend within it such acts and misdeeds as the learned judge has found to have taken place in this case on the borders of Brazil and Bolivia. It is plain, when one considers this question, that, as regards some acts, "piracy" and some of the matters which would come under terms contained in the warranted free clause run upon lines very close to one another; but it appears to me that those who entered into this policy have drawn a hard and fast line in that clause by saying that, though piracy, generally speaking, is one of the risks insured against, the insurers are to be exempted from liability in respect of certain named things. This entirely answers the argument for the plaintiffs based upon the general words "all other perils," which are by r. 12 of the rules for the construction of policies contained in the First Schedule to the Marine Insurance Act, 1906, declared to include only perils similar in kind to the perils specifically mentioned in the policy. It is impossible under those words to include in the category of perils insured against, as being ejusdem generis with a peril specifically mentioned as the subject-matter of insurance, acts or things which are actually specified in the document as included in the opposite category, namely, that of risks which are excluded from the insurance. That being so, the question remains whether the acts of those who seized the goods insured in this case do or do not come within one or other of the heads mentioned in the warranted free clause, namely, "riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war." I do not desire to put my judgment in this case on the ground that there was here anything in the nature of war or belligerency in the sense of war between two hostile States. I do not think that it is necessary to do that.

The evidence shews that the piece of territory where the acts in question took place, though it had been delimited on paper to Bolivia, was never effectively occupied by the Bolivian Government before 1898, but had been occupied to some extent by settlers, of whom the majority were Brazilians, but some were from Bolivia. When the Bolivian troops advanced to the spot,

the Brazilian settlers appear to have retired into their own country, and endeavoured by their action thence to render the position of the Bolivian troops untenable. They did this in Brazil itself by raising what I think may properly be called civil commotions, which were as much rebellion against their own Government, which had made the delimitation between their territory and that of the Bolivian Government, as against the latter Government. This is very much like the commencement of those intestine troubles which sometimes lead to a civil war. Mr. Mountague Bernard in his "Historical Account of the Neutrality of Great Britain during the American Civil War," p. 91, says in a note in which he sums up the effect of certain decisions in the American Courts: "A civil war . . . . is never formally declared: it becomes such by its accidents—the number, power, and organization of the persons who originate, and carry it on. When the party in rebellion occupy and hold in a hostile manner a certain portion of territory, have declared their independence, have cast off their allegiance, have organized armies, have commenced hostilities against their former sovereign, the world acknowledges them as belligerents and the contest as a war." Before the point is reached at which a state of civil war can be said to exist, there are, as the author points out, various stages. First there is, possibly, a riot, and this may be followed by what may be described as "civil commotion." I think this was the stage at which affairs had arrived in the present case. If the adventure of those who seized the goods had been more successful, it might have developed into a civil war. But, being what it was, I think that it may properly be described as a "civil commotion," and therefore comes within the express exception in the warranted free clause. For these reasons I agree that the appeal should be dismissed.

KENNEDY L.J. In this case the learned judge was in the position of both judge and jury, and had to decide all questions which might arise, whether of law or fact. Having heard the arguments which have been addressed to us, I cannot find any ground for saying that in the conclusion at which he arrived he was wrong either in law or in fact. The policy sued upon

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was a policy of insurance upon goods and merchandise shipped upon a vessel called the *Labrea* for carriage from Para at the mouth of the Amazon to Puerto Alonzo and (or) other places on the river Acre and (or) in that district. It is on the face of it, having regard to the place of departure and the place of destination, what I may call a "riverine" policy, upon goods which were to be carried, not upon the sea, but upon a river. Para, the port of departure, is at the mouth of the Amazon, and, though the estuary, where the river joins the sea some way further up, and the river itself for a long distance inland are of great width, the river being one of the largest in the world, those who accepted the insurance in this case must be taken to have known that this was a riverine policy, and that none of the transit was to be upon the high seas, the destination of the vessel being a place situated far inland upon a tributary of a tributary of the river. The word upon which this case turns is "piracy." The view which Pickford J. appears to have been disposed to take, though he refrained from giving any decision upon the point, and which to the best of my judgment is correct, is that there might be a loss by "piracy" within the meaning of such a policy as that in question, though that loss was not upon the open sea or within the jurisdiction of the Court of Admiralty. I doubt whether the insurance company who entered into this policy could be heard to say that they meant by that word something which could not possibly happen during the voyage in reference to which the policy was effected. The authorities shew that the word "piracy" is one capable of various shades of meaning, and that, even when used strictly as a legal term, it may be held to cover different subject-matters according as it is considered from the point of view of international or that of municipal lawyers. It seems to me that in the case of a policy like this it ought, if possible, to be construed in the sense which would give it a meaning applicable to the insurance effected by the policy. I do not doubt the general correctness, according to the existing authorities, of the definition given by the late Mr. Carver in s. 94 of his valuable work on Carriage of Goods by Sea, 4th ed. p. 117, where he says: "Piracy is forcible robbery at sea, whether committed by marauders from outside the ship or

by mariners or passengers within it. The essential element is that they violently dispossess the master, and afterwards carry away the ship itself, or any of the goods, with a felonious intent." In the case, however, of this policy, so far as their intention went, the parties could not have meant by the term "piracy" something taking place in the open sea, because that meaning would be inapplicable to the particular voyage; and I am disposed to think that there may be "piracy" in such a locality as that of this voyage.

The question remains whether what occurred in this case was "piracy" in any sense of that term. In dealing with that question a judge sitting without a jury must direct himself as to the meaning of the term "piracy" in the particular contract upon which the action is brought. In my opinion Pickford J. was right in holding that, so far as the matter is one of legal construction, the term "piracy" must be regarded as having been used in a business document like this policy of insurance in the sense in which business men would generally understand it; and I think that, from that point of view, he was right in defining "pirates" as being those who plunder indiscriminately for their own gain, not persons who operate solely against the property of a particular Government for such objects as those for which the persons who seized the goods insured were operating against the Government of Bolivia in the present case. If there had been a jury, I am not prepared to say that the learned judge would have been wrong if, in order to ascertain the business meaning of the term "piracy" as used in a business document like this policy, he had put questions to the jury as to its meaning; for though, of course, it is, as a rule, for the judge to construe a document, it is in the case of a mercantile document sometimes properly within the province of a jury, where there is any evidence that in a particular line of business a term has a special meaning, to assist the judge by a finding as to its meaning. The learned judge in this case, sitting without a jury, has asked himself what "piracy" meant in this policy, and he has given it a meaning which clearly does not bring that which happened within the meaning of the term. To my mind the term "piracy" is inapplicable to the acts of the persons who

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Kennedy L.J.

seized the goods insured in this case, however wrongful or lawless their conduct may have been according to the law of Brazil or Bolivia. They seized these goods not for their private gain, but in furtherance of a political adventure in the latter country. I do not think that any business man would say that those acts constituted "piracy" in the sense in which that term is used in this policy. They are more like the matters mentioned in the warranted free clause, such as riot or civil commotion. I do not think it is necessary to discuss such cases as *Palmer* v. *Naylor* (1) and *Nesbitt* v. *Lushington* (2), the particular facts in which Mr. Carver has covered in his definition of "piracy," to which I have referred, by saying that piracy may be committed not only by marauders from outside the ship but also by mariners or passengers within it. The matter may hereafter have to be considered further. I do not think that the acts proved here, in the circumstances, constituted those who did them pirates in such a sense as would give any nation a right to deal with them as being "hostes humani generis." Assuming that in some connection the term "piracy" may include all that is covered by Mr. Carver's definition, I am clearly of opinion that, in dealing with this particular case, the learned judge has given the right judgment both as regards the law and the facts.

Appeal dismissed.

Solicitors for plaintiffs: *Thos. Cooper & Sons.*
Solicitors for defendants: *Waltons, Johnson, Bubb & Whatton.*

(1) 10 Ex. 382. (2) 4 T. R. 783.

E. L.

[IN THE COURT OF APPEAL.]

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1909

Jan. 22; *March* 2.

GRIFFITHS *v.* FLEMING and Others.

Insurance (Life)—Husband and Wife—Insurance by Husband on Wife's Life—Insurable Interest—Life Assurance Act, 1774 (14 *Geo.* 3, *c.* 48), *ss.* 1, 3—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 11.

A husband has as such an insurable interest in his wife's life; and, therefore, it is not necessary in order to establish the validity of a policy of insurance effected by a husband upon the life of his wife to give affirmative evidence as to the existence and extent of a pecuniary interest of the husband in the life of his wife. The interest is presumed to the extent of the amount insured by the policy.

A husband and his wife effected with an insurance association a policy whereby, in consideration of a premium of which each paid part, a sum of money was made payable upon the death of whichever of them should die first to the survivor. The wife having died, the husband brought an action upon the policy to recover the policy money:—

Held, upon the footing that the policy was an insurance by the husband upon the life of the wife, that, notwithstanding the provisions of the Life Assurance Act, 1774, it was not necessary, in order to maintain the action, that the plaintiff should prove that he had any pecuniary interest in the life of his wife.

By Farwell L.J. and Kennedy L.J., the policy might also be regarded as a valid insurance under the Married Women's Property Act, 1882, s. 11, by the wife of her own life expressed to be for the benefit of the husband, contingently on his surviving her.

Appeal from the judgment of Pickford J. in an action tried before him without a jury.

The action was brought by the plaintiff, George Edward Griffiths, against the defendants, as trustees of the United Kingdom Temperance and General Provident Institution, upon a policy of life insurance granted by the institution on October 8, 1907, to recover the sum of 500*l.* as having become payable under the policy upon the death of the plaintiff's wife. The policy, so far as material, was as follows: "This policy witnesseth that the grantees named in the first schedule hereto have become members of the United Kingdom Temperance and General Provident Institution (hereinafter called the Institution), and that, in consideration of the payment already made of the first premium for the assurance effected by this policy, and of the subsequent premiums, if

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any, payable as provided by the said schedule, the funds of the Institution shall be liable to pay at its principal place of business in London the sum assured mentioned in the said schedule to the person or persons to whom the same is therein expressed to be payable, upon satisfactory proof having been received and allowed by the directors of the Institution of (1.) the happening of the event mentioned in that behalf in the said schedule, (2.) the title of the claimant or claimants, and (3.) the age of the life assured if such age has not been admitted." The first schedule to the policy, which was to be deemed to be part of the policy and of the contract between the institution and the grantees, stated, inter alia, the following particulars under the following headings: "Name, address, and occupation, if any, of the grantees: George Edward Griffiths, mining prospector, and Emma Griffiths his wife, both of Oaklands, Turnbull Road, Longsight, Manchester: Name, address, and occupation, if any, of the lives assured: The same: Date of proposal and declaration, and by whom made: 3rd of October, 1907, and made by the assured: Sum assured: Amount: To whom payable: 500*l.*: to the survivor of the grantees: Event on which the sum assured by this policy is to become payable: On the death of such of the lives assured as shall first die: Age next birthday of lives assured as stated in the proposal: 36 and 31 respectively: Premium: Amount: How payable and when due: Period during which payable: 21*l.*: annually 1st October: until the death of the first of the lives assured."

It appeared that the plaintiff and his wife had, before the granting of the policy, each of them filled up and signed a separate proposal for assurance of the proposer's life, in the form issued by the institution, respectively giving therein, in answer to questions, certain particulars with regard to the proposer's age, residence, occupation, and other personal matters, and stating that the sum to be assured was, in the case of the wife, "500*l.* jointly with my husband," and, in the case of the husband, "500*l.* jointly with my wife," to be "payable at death. Table 9." Each proposal concluded with the following declaration: "I hereby declare that the above statements are true, and I agree that these statements, together with those made, or to be made to the

Institution's medical examiner, and signed by me, shall be the basis of the contract between me and the Institution: and that I will be bound by the rules of the Institution, and rest every claim by virtue of this assurance on the observance thereof." The prospectus published by the institution contained various tables giving the respective rates of premium payable in respect of different modes of life insurance. One of these was as follows: "Joint Lives Assurances. Table IX. Policies may be effected on joint lives, the sum being payable and the premium ceasing on the first death. This form of policy is specially suitable for partners in business to replace capital withdrawn on the decease of either of them, or to provide for those who may have been dependent on him. Annual premiums to assure 100*l.* with profits on the first death." Then followed the table setting forth the different rates of premium payable according to the ages of the respective lives at their next birthdays.

The wife of the plaintiff committed suicide shortly after the granting of the policy.

In their defence the defendants pleaded (inter alia) that the plaintiff had no insurable interest in the life of his late wife as required by the Life Assurance Act, 1774.

The plaintiff in reply pleaded (inter alia) that by virtue of the said policy, which was issued jointly to George Edward Griffiths and Emma Griffiths, the lives of the said George Edward Griffiths and Emma Griffiths were jointly assured, and the sum payable under the said policy was to be paid to the survivor of the grantees on the death of such of the lives assured as should first die, and by virtue of such assurance Emma Griffiths had an insurable interest in the life of the said George Edward Griffiths, and George Edward Griffiths had an insurable interest in the life of his said wife; and, alternatively, that the plaintiff would contend that by the said policy the plaintiff insured his life in favour of his wife, the said Emma Griffiths, and the said Emma Griffiths insured her life in favour of the plaintiff, her husband, and that on the death of the said Emma Griffiths the sum insured became payable to the said plaintiff.

There was evidence to the effect that the wife had contributed 10*l.* to the premium of 21*l.* which was paid before the policy was

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issued, the husband finding the remainder. It appeared that the wife had rendered services to the plaintiff by doing housework and looking after their children, and that, in consequence of her death, he had been obliged to hire some one else to perform these services in her place.

The case at the trial appeared to have been conducted on the understanding that, if the plaintiff had any insurable interest which would support the policy, he was entitled to recover the whole of the policy money.

Pickford J. held that, inasmuch as the wife had performed household services for her husband, and through her death he had in fact sustained loss by reason of having to hire some one to perform those services in her place, he had an insurable interest which would support the policy. The learned judge therefore gave judgment for the plaintiff for the amount claimed.

Jan. 22. *Simon*, *K.C.*, and *J. B. Porter*, for the defendants. The plaintiff cannot recover on this policy, not having had any insurable interest in his wife's life. This policy cannot be treated as may be suggested by the plaintiff, namely, as two separate insurances, one by the husband on his own life and another by the wife on her own life, for the payment of a sum of money on the death of the one who does not survive to the survivor; for to treat a policy like this as valid upon such a construction of it would to a great extent nullify the provisions of the Life Assurance Act, 1774 (14 Geo. 3, c. 48), inasmuch as in this way any two persons who wished to gamble upon one another's lives could do so. It is one insurance, and not two separate insurances on different lives, although there may have been separate proposals. In the case of separate insurances the premiums on each would continue payable until the particular life dropped. Here on the dropping of the first life the whole insurance determines and the policy money becomes payable. The validity of the insurance must depend on the substance of the thing, and not upon the forms which may have been gone through by the parties. It could not be that two persons who had no interest in each other's lives could validly effect a policy like this on the ground that it was an insurance by each of his own life.

This cannot be regarded as a valid insurance within the Married Women's Property Act, 1882 (45 & 46 Vict. c. 75),.s. 11. It is not an insurance effected by the wife for her separate use within the first part of that section, nor is it within the second part of the section, for it is not expressed to be either for the benefit of the wife or for the benefit of the husband, but for the benefit of the survivor of them. An insurance under that part of the section has the special effect of creating a trust in favour of the object or objects therein named, and the section provides that, as long as any object of the trust remains unperformed, the policy moneys shall not form part of the estate of the insured, or be subject to his or her debts. It is submitted that to come within that section the insurance must comply strictly with its terms, and must be expressly for the benefit of one or more of the objects therein named.

Pickford J. held that the husband had an insurable interest in the wife's life by reason of the household services which the wife rendered, such as looking after the children; but such matters are too vague and undefinable to constitute an insurable interest within the meaning of 14 Geo. 3, c. 48. By s. 3 of that statute it is provided that "in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events." That section points to some interest of a definite pecuniary character which can fairly be estimated in money. It is impossible for this purpose to estimate the pecuniary value of a matter of such an undefinable character as household services of a wife, which are not matters of legal but only of moral obligation. The value of the interest must be estimated as at the date of the insurance. How would it be possible to estimate prospectively the value of the wife's services at that date? The assured in this case were in humble life; but take the case of persons in a higher sphere. Suppose the wife was an accomplished musician, and able to instruct her daughters in music, could it be said that, because in the event of her death the husband might have to engage a governess for the purpose, he had an insurable interest on her life within the statute? A

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mere expectation of benefit without any pecuniary interest is not an insurable interest under 14 Geo. 3, c. 48: *Halford* v. *Kymer* (1); *Hebdon* v. *West.* (2) There is a dictum of Lord Kenyon to the effect that a wife must be presumed to have an interest in the life of her husband: see *Reed* v. *Royal Exchange Assurance Co.* (3); but there is really no authority to the effect that a husband has an insurable interest in his wife's life. The husband is under a legal obligation to support his wife in the sense that, if he does not provide for her, she can pledge his credit. The wife is under no such obligation towards her husband. *Barnes* v. *London, Edinburgh, and Glasgow Life Insurance Co.* (4) is not binding on this Court and was wrongly decided.

Langdon, K.C., and *F. Cuthbert Smith*, for the plaintiff. This insurance is valid even upon the assumption that the husband had no insurable interest in his wife's life. Having regard to the proposal forms, which are made the basis of the policy, there is here in reality an insurance by each of the parties of his or her own life respectively, which by the terms of the insurance is in effect expressed to be for the benefit of the other party. Both the husband and wife passed a medical examination, and they each of them signed a proposal form for an insurance on his or her life respectively, by which a sum of money was to become payable in the event of his or her death, as the case might be, to the survivor, and each contributed a proportional part of the money payable as premium. The contract is in effect that, if the wife shall survive her husband, the company will pay a certain sum to her, but, if the husband shall survive the wife, the company will pay a certain sum of money to him. It is a question for the Court whether in such a case there is really a bona fide intention on the part of each party to insure his or her own life, as the case may be, and to transfer the benefit of the insurance to the survivor, or whether the transaction is a mere cloak for gambling by some person on the life of another in which he has no interest.

This is a valid insurance within s. 11 of the Married Women's Property Act, 1882. The objects of the trust to be created under

(1) (1830) 10 B. & C. 724.
(2) (1863) 3 B. & S. 579.
(3) (1795) Peake, Add. Cas. 70.
(4) [1892] 1 Q. B. 864.

that section are sufficiently expressed where, as in the present case, the terms of the transaction sufficiently indicate them. The difference between the terms of s. 10 of the Married Women's Property Act, 1870, and s. 11 of the Married Women's Property Act, 1882, is material in this respect. By the former section the policy had to be "expressed upon the face of it" to be for the benefit of the persons in whose favour the trust was to be created, but the words "upon the face of it" are omitted in s. 11 of the later Act. Here there is an insurance of his or her life by each of the parties, expressed to be for the benefit of the other, because it is expressed to be for the benefit of the survivor.

[FARWELL L.J. The section says that, in default of any appointment of a trustee, the policy is to "vest in the insured and his or her legal personal representatives in trust for the purposes aforesaid. That being so, can the husband recover without taking out administration to the wife? Does not that create a difficulty in this case?]

If that be so, the Court could allow an amendment to meet the difficulty in point of form.

Thirdly, Pickford J. was right in holding that the husband had in this case a sufficient insurable interest in his wife's life. It has been said that the interest contemplated by 14 Geo. 3, c. 48, is a pecuniary interest. A "pecuniary interest" for this purpose includes any interest of which the value can be fairly estimated in money. The value of the wife's services to the husband is capable of such estimation. Sect. 3 of 14 Geo. 3, c. 48, speaks of the "amount or value of the interest of the insured in such life." The word "value" as contrasted with "amount" clearly indicates that the interest contemplated need not be one of a definite or liquidated amount, but may include any interest the value of which is capable of being estimated in money.

[VAUGHAN WILLIAMS L.J. Can an obligation which is merely moral be measured in money?]

In the present case the husband had more than a mere expectation of benefit; he was actually enjoying the advantage of his wife's services in possession; and that advantage was capable of being measured in money. Marriage creates a status, and the husband was in actual possession of advantages thereunder by

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reason of his wife's assistance in household matters. An insurance on her life is not like the gambling contracts aimed at by the statute. The husband has an interest in the wife's life from which he enjoys de facto advantages, and the termination of which involves him in pecuniary expense. Since the Married Women's Property Act, 1882, the position of affairs has been altered in respect to this question. The wife was under the common law regarded as one person with the husband and had no power to contract or hold property. She is now capable of earning money by her own work, and of holding and disposing of property. If she acquires property, she is under the obligation of maintaining her husband: see Married Women's Property Act, 1882, s. 20. The possibility of her earning money during coverture may be considered as giving the husband an interest in her life.

[VAUGHAN WILLIAMS L.J. The obligation of the wife under s. 20 is an obligation to the parish, not the husband.]

[They also cited *McFarlane* v. *Royal London Friendly Society* (1); *Wilson* v. *Jones* (2); *Lucena* v. *Craufurd*. (3)]

Simon, K.C., in reply cited *Anctil* v. *Manufacturers' Life Insurance Co.* (4); *In re Lambert's Estate* (5); *Holt* v. *Everall*. (6)

Cur. adv. vult.

March 2. VAUGHAN WILLIAMS L.J. read the following judgment:—This is an appeal from the judgment of Pickford J. I have come to the conclusion that the appeal must be dismissed, though I do not propose to base my judgment upon the same grounds as those upon which the learned judge acted. The claim is against the defendants, as trustees of the United Kingdom Temperance and General Provident Institution, by the plaintiff as the surviving grantee of a policy of insurance dated October 8, 1907, effected by the plaintiff and his late wife, Emma Griffiths, with the said institution on the joint lives of the plaintiff and the said Emma Griffiths, the said Emma Griffiths being now deceased,

(1) (1886) 2 Times L. R. 755.
(2) (1867) L. R. 2 Ex. 139.
(3) (1802) 3 Bos. & P. 75; (1806) 2 Bos. & P. N. R. 269; (1808) 1 Taunt. 325.
(4) [1899] A. C. 604.
(5) (1888) 39 Ch. D. 626.
(6) (1876) 2 Ch. D. 266.

for 500*l.* and profits, in consideration of a premium paid by the plaintiff and the said Emma Griffiths. I may mention here that to the extent of 11*l.* the premium was paid by the husband, and to the extent of 10*l.* it was paid by the wife, and those payments seem to have corresponded with the respective ages of the husband and wife. The defence is (1.) that, at the time of the making of the policy mentioned in the statement of claim, the plaintiff had no insurable interest in the life of his late wife, Emma Griffiths, as required by the Life Assurance Act, 1774; (2.) the plaintiff's said wife committed suicide, being of sound mind (this defence was abandoned); (3.) the directors of the above-mentioned institution had not received satisfactory proof of the title (if any) of the plaintiff pursuant to condition 2 contained in the said policy; (4.) the whole of the first and only premium in respect of the said policy was paid by the plaintiff. This, as I have said, was not the case. The reply of the plaintiff is as follows. [His Lordship read the reply, and continued:—] In short, the reply alleges that the lives of George Edward Griffiths and Emma Griffiths were jointly assured, and that the sum payable under the policy was to be paid to the survivor of the grantees on the death of such of the lives as should die first, and that by virtue of such assurance Emma Griffiths had an insurable interest in the life of George Edward Griffiths, and George Edward Griffiths in the life of his wife, Emma Griffiths. And then, alternatively, the reply sets up that the plaintiff insured his life in favour of his wife, and the wife her life in favour of her husband.

So far as this case is concerned it does not matter much which contention of the plaintiff is right—that is to say, whether the effect is that the husband had an insurable interest in the life of his wife, or whether, the wife having an insurable interest in her own life, the right to the moneys payable under the policy has become vested or may become vested in him on his taking out letters of administration. One way or the other, the Court will construe the policy so as to make it effective.

As to the question of the husband's interest in the life of his wife, the case is not covered by authority. In *Halford* v. *Kymer* (1)

(1) 10 B. & C. 724.

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Lord Tenterden laid down, in the case of a policy effected by a father in his own name on the life of his son, that the word "interest" in 14 Geo. 3, c. 48, ss. 1 and 3, means a pecuniary interest, and that therefore the policy was void in a case where the father had no pecuniary interest. And s. 3 says that "in all cases where the insured hath interest in such life or lives, event or events, no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life or lives, or other event or events." It would seem from the words of the statute, and the decision to which I have referred, as if in every case the proof of the pecuniary interest and the extent of it were essential to the validity of the policy. But there are two classes of cases in which the law presumes the pecuniary interest and does not go into the extent of the sum assured. The one case is that of the interest of a man in his own life. The authority for this is *Wainewright* v. *Bland* (1), in which Lord Abinger at nisi prius laid down that in his own life a person's insurable interest is considered to be sufficient to entitle him to recover whatever sum he may have insured it for, and that this is so if the insurance is for a portion of his life only. That case went to the Court of Exchequer upon a motion for a new trial (2), but the motion was disposed of on the ground that the policy was voided by false representations, and this question of the insurable interest of every one in his own life was not raised. The second exception is that a wife making an insurance on her husband's life need not prove that she was interested therein. Lord Kenyon, in *Reed* v. *Royal Exchange Assurance Co.* (3), said, "It was not necessary, as it must be presumed that every wife had an interest in the life of her husband." But it is said that a husband is presumed to have such an interest in the life of his wife. I can find no decision that there is or is not a presumption of an interest of a husband in the life of his wife such as there is of the interest of a wife in the life of her husband so as to enable her to insure his life without any proof of actual interest or the extent thereof. *Halford* v. *Kymer* (4) is cited

(1) (1835) 1 Moo. & R. 481.
(2) (1836) 1 M. & W. 32.
(3) Peake, Add. Cas. 70.
(4) 10 B. & C. 724.

in the text-books (see Porter's Laws of Insurance, 5th ed. p. 42) as an authority that a husband is not presumed to have an insurable interest in his wife's life. But it does not expressly decide this. Moreover, in *Huckman* v. *Fernie* (1) the Court of Exchequer, in an action brought by a husband on a policy effected by him on the life of his wife, on a motion for a new trial, raised no question as to the husband having an interest in his wife's life, though there does not seem to have been any evidence of pecuniary interest. It has been suggested by Mr. Montague Lush in his book on Husband and Wife, 2nd ed. p. 213, that, now that the husband and wife are placed on equal terms as to their rights in and powers of disposition over property, it would be reasonable to consider that each party has a presumable interest in the life of the other without the necessity of affirmatively proving it. But it is curious that the point has never been raised, although the power of the wife to contract and to acquire and hold and dispose of property was effected by the Act of 1882. I suppose that the learned author means that, now that a husband may reasonably look for pecuniary aid from his wife, just as formerly she looked for pecuniary aid from him, the husband plainly has a reasonable expectation, in case of need, of assistance from a wife in case she acquires and holds property, and that in such a case the same reason for not requiring affirmative proof of the existence and extent of the pecuniary interest arises where the husband is the insurer of his wife's life as arises in the case where the wife insures the husband's life.

It is to be observed that there is a practical reason for construing these joint insurances by husband and wife as insurances by each of the other's life, and not as an insurance by each of his or her own life, namely, that these joint insurances in practice are generally effected by partners, so as to afford protection against the loss to the surviving members of the firm likely to arise from the withdrawal of the capital of the deceased partner; and in such case the nature of the loss provided against seems to negative the construction which would treat the policy as being on the life of each insuring partner.

(1) (1838) 3 M. & W. 505.

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Nevertheless it is desirable to consider the question of how things would stand if it were held that the husband had no presumable interest in his wife's life and the policy were treated as one by the deceased wife on her own life. The question depends on the construction and meaning of s. 11 of the Married Women's Property Act, 1882, which is as follows: "A married woman may by virtue of the power of making contracts hereinbefore contained effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall enure accordingly. A policy of assurance effected by any man on his own life and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts." In my judgment the effect of this provision, so far as the wife is concerned, is that she may effect a policy on her own life or the life of her husband for her own separate use, and that the same and all benefit thereof will enure accordingly; and that, if such policy is expressed to be for the benefit of her husband or her children or any of them, the policy shall create a trust in favour of the objects therein named. This provision creating a trust is the same in the case of the husband and the wife, and in the case of the husband the obligation to name the objects of the trust seems to have been introduced to protect creditors, and we have to consider whether it can be properly said that this joint policy so names the husband as to make a trust in his favour, a trust named within the meaning of the section. I have great doubt as to this, and I think the preferable construction is to treat the policy as by the husband on his wife's life, because I am inclined to think that he has now an interest in his wife's life which ought to be presumed. Treating the policy in this way, I think it was unnecessary to go into evidence to shew a pecuniary interest in the husband as was done before the learned

judge at the trial. I agree with his ultimate decision, but on the ground that the husband is to be presumed to have an interest in the wife's life in such a sense that it is unnecessary to give affirmative evidence as to the existence of an interest. The result is that in my judgment the appeal fails.

KENNEDY L.J. read the following judgment, written by FARWELL L.J., in which he concurred:—The appellants' contention is that the policy sued on is an insurance by the plaintiff on his wife's life and that he had no insurable interest in her life. The two questions to be determined are, therefore, (1.) is the policy an insurance by the husband on the wife's life, and (2.) had he an insurable interest in her life?

The proposals have been put in and used by both sides, and, although they could not be used in an action on the policy in order to construe the policy, they could, of course, be used in an action to rectify, and both parties desire to have their rights ascertained irrespective of the form of action.

Taking, then, the proposals which were accepted by the company, it is plain that the husband proposes to insure his own life and the wife to insure her own life for the benefit in each case of the survivor of them; there is nothing to shew any intention to carry these intentions out by a single policy, unless it be the reference to table 9, which is the table relating to joint policies. It is, however, for the company to prepare the policy, and it is their duty so to prepare it as not to contravene the Act, if the proposals be such as are not necessarily in contravention thereof. In *Collett* v. *Morrison* (1) Turner V.-C., after citing Lord Hardwicke's decision in *Motteux* v. *London Assurance Co.* (2), says (3): "This case appears to me fully to establish that if there be an agreement for a policy in a particular form, and the policy be drawn up by the office in a different form, varying the right of the party assured, a Court of Equity will interfere and deal with the case upon the footing of the agreement and not of the policy." If, then, the company are correct in contending that this is a single contract

(1) (1851) 9 Hare, 162. (2) (1739) 1 Atk. 545.
(3) 9 Hare, at p. 173.

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whereby each insures not only his or her life, but also the life of the other, then, in my opinion, this is not in accordance with the proposals, for there is no proposal by either to insure any but his or her own life; the only point in making it a joint policy is to ensure the payment of the aggregate premiums so as not to allow one policy to drop and the other to remain; but this could readily have been accomplished by an express proviso, and the company cannot be allowed to set up the form of policy prepared and tendered by themselves as a ground for defeating their own liability after they have taken the benefit of the premium. There is here no question of any device for enabling a husband to insure his wife's life; each contributed a fair proportion of the premium, the husband, who was three years older than his wife, contributing 11*l.*, and the wife 10*l.* If, then, the true effect of the policy is that each spouse insures the other's life as well as his or her own, this is the result of a conveyancing blunder of the company, and not in accordance with the proposals.

Then it is argued that this policy cannot be regarded as an insurance by the wife within the Married Women's Property Act, 1882, inasmuch as it is neither for her own separate use within the first paragraph of s. 11, nor "expressed to be for the benefit of her husband" within the second, and that apart from the Act she could not insure. I am of opinion that this argument is untenable. The policy on its face provides for payment of the sum assured "to the person or persons to whom the same is therein" (i.e., in the first schedule) "expressed to be payable." The company have themselves shewn what they mean by these words "expressed to be payable" by inserting in the schedule against the words "to whom payable" the words "to the survivor of the grantees." I fail to understand why this is not "expressed" to be the husband if he survives his wife. The section is dealing with the creation of trusts, and provides that the insurance "expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects" insured. The distinction between express and implied trusts is well settled, and the Act is simply excluding implied trusts. No one could

argue that a trust declared of 1000*l.* given to trustees by deed or will for the survivor of husband and wife is an implied and not an express trust. The inclusion of children in the Act shews that this is the intention of the Act, for a class of future children cannot be named, and the usual form of trust for children in a marriage settlement is for such as attain twenty-one, or marry under that age. I am therefore of opinion that this policy should be read distributively as an insurance by the wife on her own life expressed to be for the benefit of her husband contingently on his surviving her, and by the husband on his own life for the benefit of his wife contingently on her surviving him, and that such an insurance is perfectly legal; but inasmuch as the wife's insurance takes effect under s. 11 of the Married Women's Property Act, 1882, the husband would have to take out administration to her estate in order to comply with the section before he could give a valid receipt for the sum assured, if the appeal be decided on this ground.

Pickford J. decided the case in the plaintiff's favour on another ground, namely, that the husband in this case, by reason of the value of his wife's services to him, had an insurable interest in her life. If the case rested on this alone, I should have great difficulty in reconciling it with the older cases, although the case of *Barnes* v. *London, Edinburgh, and Glasgow Life Insurance Co.* (1) is to some extent in favour of the learned judge's view. The Lord Chief Justice in *Harse* v. *Pearl Life Assurance Co.* (2) appears to have doubted that decision, and I think it difficult to support. But I have come to the conclusion that the decision of Pickford J. can be supported on a broader ground, and I desire to rest my judgment on it, namely, that a husband has as such an insurable interest in his wife's life. The contrary appears to be stated in some of the text-books, but the proposition is affirmed in Bullen and Leake, 2nd ed. p. 161. The learned authors say: "The interest in this statute means in general pecuniary interest. The interest of a father in the life of a child is not sufficient alone to support an insurance on the child's life. But a wife may insure her husband's life, and the husband his wife's." There is no reported case in the books against this;

(1) [1892] 1 Q. B. 864. (2) [1903] 2 K. B. 92, at p. 96.

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the only reported case is *Huckman* v. *Fernie* (1), where the husband's interest was assumed to be legal by counsel and Court; and this latter is important, because the objection of illegality, if it were possible, could hardly have been overlooked, and certainly ought to have been taken by the Court if they thought it a sound objection: see per Lord Eldon in *Evans* v. *Richardson*. (2) But I have come to this conclusion on the construction of the Act itself. The Act is expressed to be aimed at "a mischievous kind of gaming," and it forbids an insurance "by any person" on the life of "any person," "wherein the person for whose benefit the policy is made shall have no interest." The 2nd section makes it unlawful to effect a policy on the life of "any person" without inserting in the policy the name of the person for whose benefit it is made; and the 3rd section provides that "where the insurer hath interest in such life, ... no greater sum shall be recovered or received from the insurer or insurers than the amount or value of the interest of the insured in such life." This latter section has been held to mean "pecuniary interest" measured by the loss that would be suffered by the beneficiary if the life dropped at the date of the policy. Lord Blackburn says in *Wilson* v. *Jones* (3): "I know no better definition of an interest in an event than . . . . that, if the event happens, the party will gain an advantage, if it is frustrated he will suffer a loss." And the interest must be a legal interest, not a mere chance or expectation: *Hebdon* v. *West* (4); *Halford* v. *Kymer*. (5) It is to be observed that the words of s. 1 are assurance "by any person on the life of any person," not "on the life of any other person," and s. 2 applies to an insurance effected by a man on his own life: *McFarlane* v. *Royal London Friendly Society*. (6) I find it difficult, however, to see what pecuniary interest, in the sense of pecuniary loss arising from the loss of some legal interest, a man can be said to lose on his own death, and it has been held in *Wainewright* v. *Bland* (7) that every man is presumed to have an interest in his

(1) 3 M. & W. 505.
(2) (1817) 3 Mer. 469, at p. 470.
(3) L. R. 2 Ex. 139, at p. 150.
(4) 3 B. & S. 579.
(5) 10 B. & C. 724.
(6) 2 Times L. R. 755.
(7) 1 Moo. & R. 481.

own life and in every part of it, and that an executor suing on a policy effected by his testator on two years of his life is not bound to shew that such testator had any special reason for making such limited assurance. But this must be on the ground that an insurance by a man on his own life is not within the mischief of the Act. A man does not gamble on his own life to gain a Pyrrhic victory by his own death. I cannot persuade myself that such an insurance is of a pecuniary interest or within Lord Blackburn's words—that if the man dies he will gain an advantage, if he lives he will suffer a loss. The loss is in both cases his own, being either of his life or of his premiums; the pecuniary gain is his executor's. In *Reed* v. *Royal Exchange Assurance Co.* (1) Lord Kenyon went a step further and held that a wife as such has an insurable interest in her husband's life, and he refused to allow evidence to be given by her that her late husband was entitled to a life interest of large amount. This shews that he regarded the husband and wife in the same position as the individual insured, for he would otherwise have been bound to take the evidence in order to satisfy s. 3 of the Act. If the wife's insurable interest depended on her right to necessaries at her husband's expense or on the possession by the husband of a life interest, the judge could not of his own motion have excluded all evidence to shew the age of the spouses at the date of the insurance and the value of the interest or necessaries according to the station in life of the parties as compared with the sum assured. The case is very shortly reported, but in my opinion Lord Kenyon excluded the evidence on the same grounds on which evidence of insurable interest in the insurer for his own benefit would be excluded, namely, that the case was not within the mischief of the Act. If this be so, it follows, in my opinion, that the same principle must be applied to the insurance by the husband of the wife's life; a husband is no more likely to indulge in "mischievous gaming" on his wife's life than a wife on her husband's. It is not a question of property at all; it is that for this purpose husband and wife stand on the same footing and that the ruling of Lord

(1) Peake, Add. Cas. 70.

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Kenyon a century ago in favour of the wife's claim ought now to be applied in favour of the husband's.

Further, the Act 14 Geo. 3, c. 48, appears to apply to Scotland as well as to England. The Act of 14 Geo. 3, c. 78 (Fire Insurance), contains provisions that led Lord Selborne and Lord Watson to doubt whether that Act applied to Scotland: *Westminster Fire Office* v. *Glasgow Provident Investment Society* (1); but there are no similar provisions in the present Act, and, if so, it is very desirable that the same interpretation should be put on the Act in both countries. In *Wight* v. *Brown* (2) it is said: "The Lord Ordinary does not question the right of husband or wife to make a valid provision for or settlement on each other after death by life assurance. . . . . This was just a common insurance effected by a husband stante matrimonio on the life of his wife, the premium of which, for aught that appears, was paid out of the goods in communion." Again (3): "In this instance the policy was made payable on the death of his wife, of course without any intention to provide for her. There is no difference between such a policy and one opened on the husband's own life. The policy here was entirely at the husband's disposal, and the selection of an insurance on the wife's life seems to create no other peculiarity than might have been founded on, if the husband had opened a policy on any other life in which he had an insurable interest." It is true that the interlocutor was altered on appeal, but on grounds which in no way affect the statements of general law quoted above. And Lord Moncreiff says (4): "He" (the husband) "by annual payments in fact invests a sum of money in such a form that it can only become payable to himself six months after his wife's death. There is no fraud nor unfairness in such an investment by insurance. But the intention plainly is that, when his wife shall die, a sum of money shall become payable to himself for his own purposes after that event. . . . . He invests a portion of his funds or gains upon a contingent contract, that, if he shall have the misfortune to lose his wife and be then less able for labour than he has been before, he may

(1) (1888) 13 App. Cas. 699.
(2) (1849) 11 D. 459, at p. 460 n.
(3) Ibid. at p. 461.
(4) Ibid. at p. 470.

have a fund to be paid to him for his support, or for the settlement of his affairs when he himself comes to die. The husband's interest in the wife's life, which renders the insurance legitimate, is that it shall be preserved; but the event of its failing is that against which he makes the insurance for his own safety. . . . . The substance of the transaction is a contingent contract for his own benefit which can take no effect till after the marriage has been dissolved by the death of the wife. . . . . But he had still a deep interest in the life of his wife, and I cannot see any reason why he might not with perfect bona fides, and with full effect, secure to himself, by insurance, such a sum of money, of which he could never demand payment as long as the marriage subsisted." This interest appears to me to be the personal interest founded on affection and mutual assistance, and not a pecuniary interest. The actual decision in the case was that the policy money belonged to the husband and was not part of the estate in community, but the judges appear to have treated the insurable interest of the husband in his wife's life as clear.

On these grounds I am of opinion that the appeal fails and should be dismissed with costs, and, as I prefer to put it on the latter ground, the husband need not administer to his wife's estate, because he recovers on his own contract and not on hers.

Appeal dismissed.

Solicitor for plaintiff: *Isadore Goldman, for A. V. Hammond, Bradford.*

Solicitors for defendants: *Francis Howse & Eve.*

E. L.

1909.
Feb. 5;
March 4.

THE TROWBRIDGE WATER COMPANY *v.* THE WILTS COUNTY COUNCIL.

Schools—Non-provided School—Supply of Water—Maintenance of School——Liability of Local Education Authority—Education Act, 1902 (2 *Edw.* 7 *c.* 42), *s.* 7.

A water company, before the Education Act, 1902, came into operation, supplied water by meter to the managers of a voluntary public elementary school for the purposes (not being domestic purposes) of the school buildings. Since the Act of 1902 the water company continued to supply the water to the school buildings as before. No contract, other than that to be implied from the fact of supply, the purposes for which the water was supplied, and the course of dealing between the parties, was entered into between the water company and the local education authority. The water company continued, as they had done before the Act, to send the demand note for payment for the water supplied to the managers of the school, and the latter included the charges in the quarterly accounts of their expenditure sent by them to the local education authority, who paid the amount direct to the water company. The water company then gave a receipt for the amount to the local education authority. The water so supplied was necessary for the maintenance of the school. In an action in the county court by the water company against the local education authority to recover for water supplied during the year ending Midsummer, 1908, the local education authority contended that they had no power to make a contract for the supply of water to the school, and that only the managers of the school had power to make such a contract. The county court judge having given judgment for the water company:—

Held, that the local education authority had power to enter into a contract for the supply of water necessary for the maintenance of the school, and that there was evidence upon which the county court judge might properly find that they had made the contract with the water company.

Appeal from the judgment of the judge of the county court of Wiltshire holden at Bradford-on-Avon. The action was brought to recover the sum of 13*l.* 4*s.* 10*d.*, being the balance alleged to be due from the defendants to the plaintiffs for the hire of a meter and for water supplied to the Adcroft School, Trowbridge. The claim was in respect of five quarters' supply of water from Midsummer, 1907, to Midsummer, 1908, both inclusive.

The following were the facts agreed upon between the parties for the purpose of determining the legal liability of the defendants.

The plaintiffs, the Trowbridge Water Company, were incorporated by special Act in 1873 (36 & 37 Vict. c. cxxxiv.), which incorporated the Waterworks Clauses Acts, 1847 and 1863. The defendants, the Wilts County Council, were the local education authority of the county of Wilts for the purposes of the Education Act, 1902.

In or about the year 1833 a society at Trowbridge, in the county of Wilts, for the education of the poor, called the Trowbridge British School Society, established the school known as the Trowbridge British School, otherwise Adcroft School, and by deed of October 3, 1833, the premises were vested in trustees in trust for the society, and the school still remained vested in trustees appointed by order of the Board of Education as trustees for the administration of that foundation and the endowment thereof. The school was, under the Education Act, 1902, a non-provided or voluntary school, with managers appointed in conformity with the Act.

Before the passing of the Education Act, 1902, the plaintiffs supplied the managers of Adcroft School with water for the purposes of the school buildings. The water was supplied by meter and was used for flushing and cleansing (other than domestic) purposes, the payment for such water being made by the managers of the school.

Since the Education Act, 1902, came into force water was supplied by the plaintiffs to the school buildings by meter as before and was used for the purposes aforesaid.

No contract other than that (if any) which was to be implied from the Acts of Parliament, or by the use made of the water, or by the course of dealing between the parties as hereafter set out, was entered into between the plaintiffs and the defendants, nor, except so far as hereafter set out, had there been any variation in the conditions under which the water was supplied to the school.

The plaintiffs continued as before the Education Act, 1902, to send their demand to the managers of the school for the

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time being for the water supplied in the form of which the following is a specimen:—

"To the Trowbridge Water Company.
"The Managers of the old British Schools.
"Dr.

			£	s.	d.
"To water rate, quarter ending Midsummer, 1907 (due March 25, 1907)—					
Domestic					
Water closets					
Baths					
Garden					
Index of meter, gallons, 1907.					
„ Midsummer .	286,000	. . .	14	8	4
„ Lady Day, zero	·000	Hire of meter	0	3	0
	286,000	Total .	£14	11	4"

Since the Education Act, 1902, the managers of the school included the charges for the water supplied in the quarterly accounts of their expenditure sent in by them at the end of every quarter to the general education committee. A specimen of the heading of these quarterly accounts was as follows:—

"Wilts County Council.
"General Education Committee. Trowbridge Boys British School.
"Day School expenses.
"Claim of the managers for the quarter ended June 30, 1907."

The accounts then received the consideration of the general education committee, and, if approved, payment was made by the county council as the local education authority to the Trowbridge Water Company, and the Trowbridge Water Company, through their manager, Mr. A. J. Knowles, gave receipts, of which the following is a specimen:—

"Wilts County Council.

"General Education Committee, No. E94.

"To Trowbridge Water Co.

"25th October, 1907.

"The Treasurer of the Committee has been authorized to pay you the undermentioned sum on presentation of this notification with the form of receipt hereunder filled in and signed at the Trowbridge branch of the Capital and Counties Bank, Limited.

"T. A. Dring,
"County Accountant.

"Receipt.

"Received from the Treasurer of the General Education Committee the sum of —— pounds fifteen shillings and —— pence for meter rent and water supplied quarter ended Michaelmas, 1907, Trowbridge Adcroft Boys School.

"£0 15*s.* 0*d.*

"Signature, Albert J. Knowles.
"Date, 28th November, 1907.

"This receipt must be presented at the bank named above not later than 30th November, 1907, or payment will not be made."

This document may be presented through a banker.

Capital & Counties Bank, Ltd., Trowbridge.

The conditions of s. 7, sub-s. 1 (*a*)—(*e*), of the Education Act, 1902, had all been duly complied with. There was no teacher's dwelling-house attached to the school buildings.

The defendants contended that they were not liable in law to the plaintiffs, but that the proper defendants were the managers of the school.

The plaintiffs contended that the defendants were liable.

If the Court were of opinion that the plaintiffs' contention was right, then judgment was to be entered for the amount claimed with costs; if on the other hand the Court were of opinion that the defendants' contention was right, then judgment was to be entered for the defendants with costs, subject to the right of either party to appeal.

The county court judge in his judgment said that it was not disputed that the supply of water in respect of which the claim

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was made was necessary for the maintenance and efficiency of the school, nor was it alleged that the supply or the sum claimed was in any way excessive; and he held that, as the defendants were by s. 7, sub-s. 1, of the Education Act, 1902, under the obligation to the public to maintain the school and keep it efficient, they had power to contract for those things which were necessary for its maintenance and efficiency, and that, upon the facts of the case, the defendants were liable in contract to the plaintiffs either upon the ground of novation or upon the ground that the managers of the school acted as the defendants' agents in making the contract for the supply of the water. He accordingly gave judgment for the plaintiffs for the sum claimed. The defendants appealed.

C. A. Russell, K.C., and *T. H. Parr*, for the defendants. It is admitted that a proper supply of water is necessary for the maintenance of the school, but the defendants, as the local education authority, are not liable to the water company for the supply of water to the school. The defendants are a statutory body and have no power to make a contract for such supply. The school is a necessary public elementary school within s. 7, sub-s. 1, of the Education Act, 1902, not provided by the local education authority. Before that Act non-provided schools were voluntary schools, and under the former Education Acts school boards had no control over them. By ss. 5 and 19 of the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), school boards were bound to provide sufficient school accommodation by building or otherwise providing schools within their district, and by s. 18 they had to maintain and keep efficient the schools provided by them, that is, the board schools. They had no power over voluntary schools. The Education Act, 1902, s. 5, abolished school boards and gave the local education authority the powers and duties of a school board, but it did not hand over to them the management of the voluntary, that is, the non-provided, schools. No doubt it gave them a limited power over them. By s. 7, sub-s. 7, and s. 11, sub-s. 6, of the Act, a non-provided school is under the control of the managers of the school, who are appointed under s. 6, sub-s. 2, of the Act, the majority being

foundation managers, that is (s. 11, sub-s. 1), appointed under the provisions of the trust deed of the school. The managers of such a school have the duty of carrying it on, and all powers of management are vested in them; and the local education authority only have, under s. 5 and s. 7, sub-s. 1, the control of secular instruction in the school and the obligation to maintain and keep the school efficient by providing the managers with the necessary funds so long as the conditions specified in s. 7, sub-s. 1 (*a*)—(*e*), are complied with. With those exceptions the managers of a non-provided school carry it on in the same way as the managers did before the Act of 1902, and they alone are liable for articles supplied to the school, though they are entitled to be indemnified by the local education authority in respect of all expenses necessarily incurred by them in carrying on the school. This indemnity is implied from the duty imposed by s. 7, sub-s. 1, upon the local education authority to "maintain and keep efficient all public elementary schools within their area which are necessary." The local education authority, so long as the conditions specified in the Act are complied with, have no power to interfere with the management of non-provided schools and no power to withhold the money necessary for their maintenance and efficiency. The managers are themselves principals, and are not the agents of the local education authority to carry on the schools, and they do not make contracts as agents, but as principals. Any contract, therefore, for the supply of things necessary for the maintenance of the school, such as water, must be made by the managers, and the local education authority have no power under the Act to make such contracts, nor have they any statutory liability for such supply. Sched. I., B (4.), to the Act expressly imposes upon the managers of a school provided by the local education authority the duty of managing the school as the latter may determine. There is no such provision in the case of non-provided schools. If the managers of non-provided schools have power to make contracts as agents for the local education authority, the control of the expenditure which is given to the local education authority by s. 7, sub-s. 1, will in effect be taken away, because those who supply the articles to the school upon the order of the managers

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can in that case always sue the local education authority, who will have no defence, though the supply may be excessive, whereas, if the managers are liable as principals, they can only claim indemnity from the local education authority in respect of such expenses as are reasonably necessary for carrying on the school, and any dispute as to that would have to be settled, under s. 7, sub-s. 3, by the Board of Education. Moreover, if the local education authority are directly liable for the cost of maintenance, difficulties may arise where the managers fail to comply with the conditions specified in s. 7, sub-s. 1 (*a*)—(*e*), as in such a case the obligation of the local education authority to maintain the school ceases. The defendants, therefore, have no power to make a contract for the supply of water to the school. Even if the local education authority have such a power of contracting, there is no evidence here of any contract made by them, or of any novation as found by the county court judge. The accounts were sent in by the plaintiffs to the managers, though for the sake of convenience they were paid by the defendants direct to the plaintiffs. That does not afford any reasonable evidence of a contract between the plaintiffs and the defendants. For instance, s. 7 of the Act of 1902 does not create privity of contract between a teacher in a non-provided school and the local education authority, though the salary is paid directly by the latter: *Crocker* v. *Plymouth Corporation.* (1) That decision is directly in the defendants' favour. The judgment of the county court judge was therefore wrong. [They also referred to *Attorney-General* v. *West Riding of Yorkshire County Council.* (2)]

Sir Alfred Cripps, K.C., and *Holman Gregory*, for the plaintiffs. A local education authority have power to make contracts for the supply of water and other articles to a non-provided school for the purpose of maintaining it and keeping it efficient under s. 7, sub-s. 1, of the Education Act, 1902. That section imposes the duty upon the local education authority of maintaining and keeping efficient all public elementary schools, whether provided or non-provided. The only duty of the managers with regard to

(1) [1906] 1 K. B. 494. (2) [1906] 2 K. B. 676; [1907] A. C. 29.

the school building is, under s. 7, sub-s. 1 (*d*), to provide it free of charge, and, out of their funds, to keep it in good repair and to make such alterations and improvements as may be reasonably required by the local education authority. No doubt in practice it is usual for the managers to make the necessary contracts, but, if they do, they do so as agents for the local education authority, and the latter are liable as principals upon those contracts. Sect. 7, sub-s. 1, imposes upon the local education authority not merely, as the defendants contend, the duty of providing the money, but also the duty of maintaining the school. There is, therefore, a statutory duty imposed upon the local education authority of paying for those articles which are necessary for the maintenance of the school. Before the Act of 1902 the managers of a voluntary school were responsible for all expenditure incurred in the school. Since that Act the managers are only responsible for providing the schoolhouse and keeping it in repair. As Lord Loreburn L.C. said in *Attorney-General* v. *West Riding of Yorkshire County Council* (1), the obligation in s. 7, sub-s. 1, of the Act to "maintain" cannot mean one thing in the case of non-provided schools and a different thing in the case of provided schools; and a little earlier he said, speaking of a non-provided school, that in all other items of expenditure beyond those which are apportioned between the local education authority and the managers the sole paymaster is the local education authority. In all contracts which the managers make for the purpose of maintaining the school, except for the actual repairs to the building and in one or two other cases, they act as agents of the local education authority, and the latter are liable on the contracts so made. The county court judge has found that the supply of water for which payment is claimed was necessary for the maintenance and efficiency of the school, that the supply was not excessive, and that the sum charged was reasonable. The defendants are therefore liable to the plaintiffs upon the claim. Further, if the managers were not the agents of the defendants to make the contract, there was evidence which entitled the county court judge to come to the conclusion that the defendants

(1) 1907] A. C. 29, at p. 36.

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themselves, by their conduct, bound themselves by contract to the plaintiffs to pay for the water supplied.

C. A. Russell, K.C., did not reply.

Cur. adv. vult.

March 4. The judgment of the COURT (Bigham and Walton JJ.) was read by

WALTON J. This is an appeal from a judgment of the learned judge of the county court of Wiltshire, holden at Bradford-on-Avon, in which he has held that the plaintiffs, the Trowbridge Water Company, are entitled to recover from the defendants, the Wilts County Council, the sum of 13*l.* 4*s.* 10*d.* for water supplied by the plaintiff company to a public elementary school known as the Adcroft School. The Wilts County Council are the local education authority of the county of Wilts for the purposes of the Education Acts.

The Adcroft School, which was established about the year 1833, is a public elementary school within the district of the defendant council. It was assumed in the Court below and in the argument before us that the school is a necessary public elementary school within the meaning of s. 7, sub-s. 1, of the Education Act, 1902. It is a voluntary school, that is, a school which is not provided by the local education authority within the meaning of the Act of 1902. Water was supplied to the school by the plaintiff company both before and after the passing of the Act of 1902. It was supplied by meter, under no express contract either written or oral, and under no contract in fact other than that which is to be implied from the fact of supply, the purpose for which the water was supplied, and the circumstances under which water had been previously supplied to the school and paid for. It was admitted before us that a supply of water was necessary for the maintenance of the school. On the argument before us, and, as it appears to us, on the hearing before the county court judge, it was assumed that the water was taken wholly and exclusively for the purposes of the maintenance of the school, and not for other purposes for which the local education authority would not be responsible.

The main contention before the county court judge appears to

have been that the local education authority have no power to enter into contracts for the supply of water or anything else which may be required for the maintenance of a non-provided school, and, therefore, that the defendants had no power to enter into a contract for the supply of water to the Adcroft School.

The first question of law, therefore, which we have to decide is whether the county court judge was right in holding, as he did, that the defendants had power to enter into such a contract. Mr. Russell, on behalf of the defendants, contended that in construing the Act of 1902 it was necessary to consider the state of the law before the Act of 1902. Under the Elementary Education Act, 1870, public elementary schools were of two classes—(1.) board schools, and (2.) voluntary schools. All schools of either class alike received certain assistance from the State in the form of a parliamentary grant. Subject to this board schools, which were provided by the school board representing the ratepayers, were maintained by the school board out of the rates, and voluntary schools, which were not provided by the school board or the ratepayers, were maintained out of funds provided privately. Neither the school board nor any public authority was responsible for or had any control over the maintenance of voluntary schools or the expenditure required for that purpose, or any power to interfere in the appointment of the person or persons who had the management of voluntary schools.

This was the state of things until the passing of the Act of 1902, by which, as is well known, important changes were made. School boards were abolished, and local education authorities were created, upon whom there devolved the obligation to provide such school accommodation as might be necessary in order to supply a sufficient amount of public school accommodation for their respective districts (Education Act, 1902, s. 5; Elementary Education Act, 1870, s. 18). Under the Act of 1902 all public elementary schools are either schools provided by the local education authority or schools not so provided. Instead of the board schools and voluntary schools there are now provided and non-provided schools. But by the Act of 1902 the management of the non-provided schools is, to a certain extent, placed under the control of the local education authorities. It is provided by

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s. 6, sub-s. 2, that all non-provided schools shall have a body of managers "consisting of a number of foundation managers not exceeding four appointed as provided" in s. 11 of the Act, and practically representing the owners of the school, and two appointed by the local education authority or authorities; and by s. 7, sub-s. 1 (*a*), these managers are directed to "carry out any directions of the local education authority as to the secular instruction to be given in the school, including any directions with respect to the number and educational qualifications of the teachers to be employed for such instruction, and for the dismissal of any teacher on educational grounds; and if the managers fail to carry out any such direction the local education authority shall, in addition to their other powers, have the power themselves to carry out the direction in question as if they were the managers; but no direction given under this provision shall be such as to interfere with reasonable facilities for religious instruction during school hours." By sub-s. 1 (*b*) "the local education authority shall have power to inspect the school."

The management of the voluntary or non-provided schools having been thus regulated by ss. 6 and 7, s. 7 also provides for the maintenance by the local education authority of all public elementary schools whether provided or non-provided. Sect. 7, in so far as its provisions are material to the present case, is as follows: "(1.) The local education authority shall maintain and keep efficient all public elementary schools within their area which are necessary, and have the control of all expenditure required for that purpose, other than expenditure for which, under this Act, provision is to be made by the managers; but, in the case of a school not provided by them, only so long as the following conditions and provisions are complied with." The expenditure for which provision is to be made, not by the local education authority, but by the managers, is that required for providing and keeping in repair the schoolhouse, as described in s. 7, sub-s. 1 (*d*). Subject, therefore, to this exception, the Act of 1902 imposes upon the local education authority the obligation of maintaining and keeping efficient all non-provided schools in their district, which are public elementary schools and are necessary within

the meaning of the Act. Before the Act of 1902 was passed there was, under the earlier Education Acts, no obligation upon any one to maintain or keep efficient any voluntary school.

It seems quite plain that there is, under the Act of 1902, no obligation upon the managers of the Adcroft School to make themselves personally responsible for the expenditure required for the maintenance of the school. The managers might, of course, have entered into a contract for the supply of water which by its terms might have made them liable to the water company. In the present case there was no express contract. Water was supplied. The bills for the water rate were sent in quarterly by the water company to the managers of the school, were paid to the water company direct by the county council as the local education authority, and receipts for the payments were given by the water company to the county council. This was the course of business followed from the time when the Act of 1902 came into operation until the question arose which led to the present action.

Upon these facts the learned county court judge has held that the Wilts County Council are the persons liable to the water company for the water supplied. Having regard to the fact that the county council were, in the words of the Act, bound to maintain the school, and therefore to provide a supply of water, and had control of the expenditure necessary for that purpose, we think that the county council had power under the Act of 1902 to make themselves liable to the water company for the water supplied, and we think that there was evidence upon which the learned county court judge might properly find that the county council were the persons with whom the contract for the supply of water in question was made. We see no reason for thinking that his finding was wrong in law.

The case of *Crocker* v. *Plymouth Corporation* (1) was relied on by the defendants. In that case the managers of a voluntary school had before the year 1902 entered into a written contract with the plaintiff, who was a schoolmistress in the school, and the contract had not been determined when the Act of 1902 came into operation. Afterwards, in the year 1905, the plaintiff sought

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to make the local education authority liable for salary due to her under the contract, on the ground that there had been a novation whereby the local education authority had undertaken the liabilities of the managers under the contract. It was held that the local education authority were not liable. That case is very different from the present one. The learned county court judge in his judgment has spoken of a novation; but we think that there is no question of novation in this case, and that the judgment must be supported on the grounds which we have stated. There is no question of any pre-existing contract made between the water company and the managers before the Act of 1902 and afterwards adopted by the local education authority. The liability to pay for the water is under the contract which is to be implied and arises from the fact that the water is taken. The question is by whom and for whom it was taken. Again, in *Crocker* v. *Plymouth Corporation* (1) the contract in question was for the appointment of a teacher, and the rights, powers, and obligations of the managers and the local education authority as to the appointment of teachers are separately and exceptionally dealt with by the Act of 1902. By s. 7, sub-s. 7, the managers of a non-provided school have the exclusive power of appointing and dismissing teachers. That case, therefore, is distinguishable from the present case.

It was argued by the defendants that, inasmuch as the obligation of the local education authority to maintain the school ceases upon the breach by the managers of any of the conditions prescribed in s. 7, sub-s. 1, practical difficulties will arise in the working of the Act if the local education authority are directly responsible for the cost of maintenance. We think that such difficulties may easily be foreseen and provided against.

This appeal must be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiffs: *Ford & Ford, for Wansbrough, Robinson, Tayler & Taylor, Bristol.*

Solicitors for defendants: *Rossiter & Odell, for E. B. Titley, Bath.*

(1) [1906] 1 K. B. 494.

W. F. B.

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Oct. 27, 28; *Nov.* 10.
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Jan. 13, 14; *Feb.* 6.

Mortgage—Lease by Mortgagor in possession—Lease including Land other than Mortgaged Land—Option to determine—Option to renew—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 18.

A lease made under the provisions of s. 18 of the Conveyancing and Law of Property Act, 1881, by a mortgagor in possession is valid as against the mortgagee notwithstanding that it contains an option for the lessee to determine the lease before, or to renew the lease after, the determination of the term.

But if the demised premises include land other than the mortgaged land, and one inclusive rent only is reserved, the lease is invalid as against the mortgagee. A deed of apportionment subsequently executed between the mortgagor and his lessee apportioning the rent as between the several parcels does not validate such a lease as against the mortgagee.

Trial of action before Bucknill J. without a jury.

The action was brought to recover possession of certain lands at Selsey Bill with a hotel and other buildings erected thereon.

The plaintiff was executrix of one George Hall King, deceased, who was mortgagee of the land and premises. The defendant was the wife of one Oswald Bird and claimed to be lessee of the land and premises under a lease made by an assignee of the equity of redemption.

The facts are stated in detail in the written judgment of Bucknill J. The following brief summary is added in order to indicate the points decided.

By an indenture of mortgage dated December 11, 1901, and made between William George Daniels of the first part, Joseph George Burne of the second part, and George Hall King of the third part, a piece of land with a hotel and buildings thereon, hereinafter called the First Acre, was conveyed and assured to the said George Hall King in fee simple by way of mortgage for securing the payment to the said George Hall King of the principal sum of 4500*l.* and interest thereon as therein mentioned. The equity of redemption was reserved to William George Daniels, his heirs and assigns.

George Hall King died on January 10, 1902, having by his

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will, which was duly proved, appointed the plaintiff his sole executrix.

On November 13, 1904, W. G. Daniels sold to one John Buchanan Beattie the equity of redemption in the First Acre, of which he had remained in possession after the mortgage of December 11, 1901.

In the year 1905 Beattie was let into possession of certain land adjoining the First Acre and hereinafter called the Second Acre by the owner thereof, one Powell, who then or soon afterwards was in negotiation with Beattie for the purchase thereof. Beattie, having thus been let into possession of the Second Acre, made certain additions to the hotel which had been erected on the First Acre, and some of these additions or alterations were built or placed upon the Second Acre.

On December 11, 1907, Beattie, being in possession of the First and Second Acres, by indenture of that date purporting to be made in pursuance of the powers conferred by s. 18 of the Conveyancing and Law of Property Act, 1881 (1), granted a

(1) Conveyancing and Law of Property Act, 1881 (44 & 45 Vict. c. 41), s. 18: "(1.) A mortgagor of land while in possession shall, as against every incumbrancer, have, by virtue of this Act, power to make from time to time any such lease of the mortgaged land, or any part thereof, as is in this section described and authorised . . . .

"(3.) The leases which this section authorises are—

"(i.) An agricultural or occupation lease for any term not exceeding twenty-one years; . . . .

"(4.) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf.

"(5.) Every such lease shall be made to take effect in possession not later than twelve months after its date.

"(6.) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken.

"(7.) Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

"(8.) A counterpart of every such lease shall be executed by the lessee and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall, in favour of the lessee and all persons deriving title under him, be sufficient evidence . . . .

"(11.) In case of a lease by the mortgagor, he shall, within one month after making the lease, deliver to the mortgagee, or, where there are more than one, to the mortgagee first in priority, a counterpart of the lease duly executed by

lease to the defendant of the First and Second Acres with the hotel thereon and the outbuildings and appurtenances thereto for a term of seven years from December 11, 1907, determinable at the option of the lessee at the end of the second or fifth years on giving three months' notice in writing, at a rent of 220*l.* for the first two years, 250*l.* during the next four years, and 300*l.* for the last year. The lease contained a proviso that if the lessee should be desirous of continuing the tenancy at the expiration of seven years she should be at liberty to do so and to renew the lease for the further period of seven years at the rent of 350*l.* a year on giving the lessor six months' notice in writing of her intention.

The defendant was in possession under this lease and relied upon it as entitling her to remain in possession as against the plaintiff.

Shortly after action brought a deed of apportionment was executed by Beattie through his attorney and the defendant apportioning the rent as between the First Acre and the Second Acre. (1)

Radcliffe, K.C., and *J. B. Matthews*, for the plaintiff. The lease of December 11, 1907, is void as against the plaintiff. Before s. 18 of the Conveyancing and Law of Property Act, 1881, a mortgagor could not bind a mortgagee by any lease made after the date of the mortgage, unless the mortgage deed contained a special power in that behalf or unless the lease were made with the concurrence of the mortgagee: *Robbins* v. *Whyte*. (2) Since the passing of that enactment a mortgagor in possession may make a lease which shall be valid as against the mortgagee provided it is made in the manner and form prescribed by the enactment, which must be strictly followed.

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the lessee; but the lessee shall not be concerned to see that this provision is complied with."

(1) The defendant also pleaded that the plaintiff with full knowledge of the granting of the said lease stood by and allowed the defendant to expend money upon the said premises, and contended that the plaintiff was estopped from denying the validity of the lease. The learned judge held, on the facts, that the plaintiff had no knowledge of the terms of the lease so as to estop her. This point in the case is not thought to be of such general interest as to call for a report.

(2) [1906] 1 K. B. 125.

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That enactment does not permit a lease containing an option for the lessee to determine the lease before the end of the term, nor does it authorize a lease enabling the lessee to renew the lease at a specified rent; a lease under the Act must reserve the best rent that can reasonably be obtained—see s. 18, sub-s. 6—and it is impossible to say at the date of the lease what will be the best rent reasonably obtainable at the end of the term. The lease of December 11, 1907, contains an option to the lessee to determine the lease or to renew it at a specified rent, and is therefore void as against the mortgagee.

Secondly, the lease is void because it purports to demise at one entire rent not only the mortgaged land, but also land not included in the mortgage. The burden lies on the defendant to shew that the best rent reasonably obtainable has been reserved in respect of the First Acre; but she fails to prove this when one rent only is reserved for the First Acre and the Second Acre together. If one acre of land not comprised in the mortgage may be included at one rent among the parcels in a lease under the Act, there is no reason why any number of parcels of land, all held under different titles, should not be similarly included: see *Tolson* v. *Sheard* (1); but the Act clearly contemplates a lease of the mortgaged land with a rent reserved in respect of that land.

Schiller, for the defendant. A lease under s. 18 of the Conveyancing and Law of Property Act, 1881, is not void for containing an option for the lessee to determine the lease. Such a lease, if made in pursuance of a power contained in a deed, would be valid: see the opinion of the judges delivered by Alderson B. in *Sheehy* v. *Lord Muskerry*. (2) *Edwards* v. *Millbank* (3) is to the same effect. It matters not in principle whether the power under which the lease is made is expressed in a deed or in a statute. Neither is the lease void for containing an option for the lessee to renew the lease at the end of the term at an increased rent, because the renewal has no effect upon the term; if when the time comes for renewal the increased rent is not the best rent then obtainable, the renewal may be void; but the term remains unaffected.

(1) (1877) 5 Ch. D. 19. (2) (1848) 1 H. L. C. 576, at p. 589.
(3) (1859) 4 Drew. 606.

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Neither is this lease void for comprising among the demised premises land other than the mortgaged land and reserving one entire rent: *Brown* v. *Peto* (1); Farwell on Powers, 2nd ed. p. 599. Where upon an apportionment the reservation of rent would leave such a rent for the mortgaged land as to be in fact the best rent reasonably obtainable, the lease is valid: see Farwell on Powers, ubi sup. The rent has been apportioned as between landlord and tenant, and, if that apportionment is not binding on the plaintiff, the rent can now be apportioned as between the plaintiff and defendant: *Bliss* v. *Collins*. (2) Further, the inclusion of the Second Acre, assuming that it had the effect of invalidating the lease, is a matter which can be rectified under the Leases Act, 1849 (12 & 13 Vict. c. 26), s. 2. [He cited Sugden on Powers, 8th ed. p. 571.]

Radcliffe, K.C., in reply. The apportionment which has been made between lessor and lessee is res inter alios acta so far as the plaintiff is concerned: *Bliss* v. *Collins*. (2) The Leases Act, 1849, has no application to this case: see per Bigham J. in *Brown* v. *Peto*. (3)

Cur. adv. vult.

1909. Feb. 6. BUCKNILL J. read the following judgment:—This is an action brought by the executrix of George Hall King, deceased, to recover possession of certain land at Selsey Bill containing one acre and a hotel and other buildings on the said acre, known by the name of the Marine Hotel, together with the fixtures and fittings affixed to the hotel and buildings.

The statement of claim alleged that by a mortgage dated December 11, 1901, the said land, hotel, and buildings were mortgaged to George Hall King by the then mortgagors to secure the sum of 4500*l.*, of which 4000*l.* was still unpaid, and that the defendant was in possession of the said premises, but without right as against the plaintiff.

The defence alleged that the hotel and premises were leased to the defendant on December 11, 1907, by one Beattie, who was at the time entitled to grant the lease, and that the plaintiff was

(1) [1900] 2 Q. B. 653. (2) (1822) 5 B. & Ald. 876.
(3) [1900] 1 Q. B. 346.

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bound by it; alternatively, that the plaintiff with full knowledge of the lease stood by and allowed the defendant to expend money on the premises, and was therefore estopped from denying the validity of the lease. The defendant counter-claimed also and asked for a declaration that the plaintiff was bound by the lease.

The plaintiff's objections to this lease are, as pleaded in paragraph 4 of the reply and defence to the counter-claim, (*a*) That the lease was not confined to the property comprised in the plaintiff's mortgage, but included other property. (*b*) That the lease was not for a term certain, but was determinable at the option of the lessee at the end of the second or fifth year. (*c*) That the lease contained an option of renewal for a further term of seven years. (*d*) That the lease was granted to the lessee for and on behalf of a company intended to be formed; but this last objection was not relied on at the trial.

A question was raised at the trial which was not specifically raised in the pleadings of the defendant, namely, whether, if the lease is defective, relief can be granted under the provisions of the Leases Act, 1849.

The piece of land and the hotel and buildings thereon, to recover possession of which this action is brought, consist of one acre of ground described in the mortgage of December 11, 1901, from Daniels and Burne to George Hall King, now deceased, as "All that piece or parcel of land situate at Selsey Bill in the parish of Selsey in the county of Sussex possessing a frontage to the highway of about 210 feet with an average depth of about 210 feet and containing one acre statute measure bounded on the north and east sides by land now or late belonging to Newton Clayton and Hubert John Powell on the south by land now or late belonging to the Pagham Harbour Reclamation Company and on the west by the highway leading from Selsey village to the sea and more particularly delineated and described in the plan thereof drawn on the conveyance to J. A. R. Vanderburgh dated July 26, 1899." That plan gives a correct description of the First Acre, by which name I shall describe the land which is the subject of this action, as also of what I shall call the Second Acre; and it will be seen that as to part of that acre it is to the

north of the First Acre, and as to the other part to the east of it, forming a right angle.

After Vanderburgh purchased the First Acre, he instructed an architect to prepare plans for the hotel which was built on it, and at that time the whole of the premises stood upon the First Acre. On November 13, 1904, W. G. Daniels sold his equity of redemption in the First Acre to Beattie, and in 1905 Beattie, having been let into possession of the Second Acre, made certain additions to the hotel, the result of which was that some of those additions and alterations were built or placed upon the Second Acre. In 1907 Beattie contracted with Powell to purchase the Second Acre of him, but that contract was never completed.

This is the history shortly stated of the First and Second Acres, so far as it is relevant to the present action. Since these alterations and additions were made by Beattie the hotel and premises have stood partly upon the First Acre and partly upon the Second Acre, and have always been occupied in that manner. The main building, of course, always stood upon the First Acre.

Beattie, having spent a considerable sum of money in and about the hotel and premises, fell into arrear with the payment of his interest on the mortgage deed of December 11, 1901. There were second and third mortgages also upon the property, to which it is not necessary to refer further, except to say that they described the mortgaged property as being two acres instead of one acre. At this time Beattie appears to have been in considerable financial difficulty, and, the plaintiff in this action having failed to obtain from him payment either of the principal due on the mortgage or the interest thereon, steps were taken to obtain a receiver of the property on her behalf, but no one ever acted in that capacity.

On December 11, 1907, Beattie granted to the defendant the lease which is the subject of this action. The premises demised by it are described as "All that piece or parcel of land fronting the New Road Selsey on the west and the sea front on the south with the messuage or hotel thereon erected and built situate at Selsey in the county of Sussex and called or known as the Marine Hotel together with the stables motor garages electric power house outbuildings and appurtenances to the said hotel and

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premises belonging or therewith held and enjoyed by the lessor." The term for which the lease was granted was for seven years from December 11, 1907, determinable at the option of the lessee only at the end of the second or fifth years of the said term on giving three months' previous notice in writing; but the lessee was to be at liberty on giving six months' notice to renew for a further term of seven years at the rent of 350*l.* The rent payable under the said lease during the first two years was fixed at 220*l.*, during the next four years at 250*l.*, and during the last year at 300*l.*

It is to be observed that the extent of the land demised by the said lease is not expressed, but that it extended to the First and Second Acres respectively is clear from the contents of a deed dated April 14, 1908, and made between Beattie and the husband of the defendant, which deed is called "supplemental to the lease of December 11, 1907," and in that supplemental deed it is recited that in the lease of December 11, 1907, the land upon which the hotel buildings and appurtenances stood contained two acres more or less, that is to say, the First and Second Acres above referred to.

The lease of December 11, 1907, was granted by Beattie to the defendant without any notice to the plaintiff as his mortgagee, nor was any copy of it sent to her until long after. In addition to the defendant becoming lessee to Beattie, she purchased certain furniture of him which was in the hotel. Early in January, 1908, Beattie left this country for India and has apparently not returned since.

[His Lordship then dealt with the question mentioned in note (1) on p. 839, ante, deciding that the plaintiff had not by her conduct precluded herself from asserting that the lease was invalid as against her, and continued:—]

I come now to the questions raised in the fourth paragraph of the reply and defence to the counter-claim, which alleges that the lease by Beattie was not a proper exercise by him of his power as mortgagor to lease. I have already referred to the objections to the lease, and I need not do so again seriatim.

As to the proviso in the lease, that if the lessee should be desirous of continuing the tenancy at the expiration of seven

years she should be at liberty to do so and renew for a further seven years at 350*l.* a year on giving the lessor six calendar months' notice in writing of her intention, I think this proviso does not invalidate the lease, because it does not affect the original term of seven years. The rent to be paid for the second seven years may or may not be the best rent obtainable. If on such renewal it could be shewn that 350*l.* was not the best rent, then the renewal would, in my opinion, be invalid as against the mortgagee for that reason; but that is not the same thing as holding that the liberty to renew invalidates the lease now, and I do not think it does.

Secondly, as to the objection that the lease may be determined at the option of the lessee at the end of the second or fifth years on notice given by her to the lessor subject to the lessor's rights and remedies in respect of any rent in arrear or any breach of covenants on the lessee's part, this seems to be, and is in my opinion, a much more difficult question to answer; and although I decide that such a covenant does not invalidate the lease, I do so with much hesitation. The power given by the Act to lease is a power to lease the mortgaged premises for any term not exceeding twenty-one years. There can be no doubt, I think, that in construing such a section as this, which for the first time gave the mortgagor a right to lease the mortgaged premises of which he was in possession as against the mortgagee, one must construe the words strictly, and one cannot, in my opinion, inquire into the question whether the covenants in the lease are usual or not, but one must decide whether the Act has been complied with or not. Therefore the question is whether a lease containing a covenant which gives the lessee a right to determine is or is not a lease for a term within the Act. I only propose to refer to two cases, and they are, first of all, *Sheehy* v. *Lord Muskerry* (1), where Alderson B., delivering the unanimous opinion of the judges called upon to advise the House of Lords, said: "A lease for a term of years, with a clause enabling the tenant to surrender, is still a lease for a term of years." And a little later in the same judgment he said: "If a power be given

(1) 1 H. L. C. 576, at p. 589.

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to make leases containing the usual reservations and covenants, and such a covenant to surrender were shewn to be an unusual covenant, a lease containing it would be an invalid execution of such a power: . . . . but where the power contains no such limitation, we think there can be no such objection made." The other case is *Edwards* v. *Millbank* (1), where it was held that a lease for twenty-one years, granted by trustees of a marriage settlement which contained a power to lease for any term of years not exceeding twenty-one years, was not invalid because it contained a power on the part of the lessee to determine the lease at the end of the seventh or fourteenth year. There Kindersley V.-C. said (2): "Suppose the power in the present case had been a power to demise or lease for *any* term of years. Would it be less a term because it is made determinable under certain circumstances? It has been held that it is not less a term because it is made determinable at the option of the lessor, and it has also been held that such a term is within the power, and there is no reason why a term determinable at the option of the lessor, or of the lessee, or of either of them, is not a term within the power; all that the power requires being that it should be a term for a number of years." Both those cases were cases in which the powers were given under marriage settlements, but, unless the Court is prepared to say that this case differs in principle from them, they are in my opinion authorities binding on me. On the whole I am not prepared to say that there is such a distinction or difference, and I decide that this lease is not invalid on this ground. I have not been able to find a report of any case under this section where there was such a clause in a lease by the mortgagor, with this one exception: I have been permitted to see a copy of the lease in the case of *Brown* v. *Peto* (3), to which reference was frequently made during the trial. In that case there was a power for the lessee to terminate his tenancy at the end of the first five, seven, or ten years of the term of fourteen years on notice to his lessor, and it is not unimportant to observe that, so far as the report of the case goes, no objection was raised that such a clause

(1) 4 Drew. 606.
(2) Ibid. at p. 611.
(3) [1900] 1 Q. B. 346; on appeal, [1900] 2 Q. B. 653.

invalidated the lease. Neither do I find any reference in any text-book to such a clause rendering a lease invalid.

The real dispute in this case, in my opinion, is whether the fact that the lease included property other than that comprised in the plaintiff's mortgage, and at one rental, invalidates the lease; and I am of opinion that it does. As I have pointed out already, although what I call the Second Acre has been for many years used by the tenant of the hotel as part of the hotel premises, and although Mr. Beattie extended the hotel itself by erecting additions which stood on the Second Acre, he held the two acres quite separately from each other. With regard to the First Acre he was mortgagor to the plaintiff; with regard to the Second Acre he was merely in possession of it by the leave and licence of the owner, between whom and himself there appears to have been some contract for purchase by him, which, however, was never completed, and the evidence of which was not adduced at the trial. I fail entirely to see how such a lease can be valid as against the mortgagee. The two acres are two distinct properties, with one of which the plaintiff has nothing whatever to do. It was urged by counsel for the defendant that the undivided rent creates no difficulty, because it has been or can be apportioned; but that is not the question that the Court has to decide. If it could be, such an apportionment would not be binding on the mortgagee, and here the deed of apportionment which has been executed between the attorney of the mortgagor and the lessee was executed so late as a week after notice of trial was given in this action. The case of *Brown* v. *Peto* (1), to which I have already referred, does not cover this case; all that case decided was that where a mortgagor had leased his mansion-house, of which he was in possession, and certain lands around it, together with a right of shooting over certain other parts of the mortgaged estate not included in that lease, and from which such shooting had previously been reserved, the lease was not invalid as against the mortgagee because it included such shooting rights in the lease of the mansion-house and grounds. In my opinion, to hold, on the objection to it with which I am dealing, that this lease is valid as against the mortgagee would

(1) [1900] 2 Q. B. 653.

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be to decide that, as against his mortgagee, a mortgagor can include any number of distinct and different properties in a lease of the mortgaged property of which he is in possession, and I hold that that does not come within the enabling section of the Conveyancing Act, 1881.

And, lastly, it is said on behalf of the defendant that, if this lease is invalid on this or the other grounds raised by the plaintiff, I can grant relief under the Leases Act, 1849. I am of opinion that I cannot do so, because, as was pointed out at the trial, there was neither mistake nor inadvertence between the contracting parties, and, in my judgment, I have no power to give such relief and so make an invalid lease valid. The result is that my judgment must be for the plaintiff on the ground that the lease is invalid as against her. I therefore give judgment for her as prayed.

Judgment for the plaintiff.

Solicitors for plaintiff: *J. D. Arthur, for Edmonds & Bullin, Portsmouth.*

Solicitors for defendant: *Woodham Smith & Borradaile, for J. A. Morris Bew, Chichester.*

W. H. G.

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Feb. 15.

Summary Jurisdiction—Charge of Offence triable summarily—Evidence in course of hearing shewing Offence triable by Jury—Jurisdiction of Justices to convict—"Before the charge is gone into"—Summary Jurisdiction Act, 1879 (42 *&* 43 *Vict. c.* 49), *s.* 17.

By s. 17, sub-s. 1, of the Summary Jurisdiction Act, 1879, "A person when charged before a Court of summary jurisdiction with an offence in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months . . . . may, on appearing before the Court, and before the charge is gone into but not afterwards, claim to be tried by a jury."

Sub-s. 2: "A Court of summary jurisdiction, before the charge is gone into in respect of an offence to which this section applies, for the purpose of informing the defendant of his right to be tried by a jury in pursuance of this section, shall address him" to the effect in the section set out, and ask him if he desires to be tried by a jury.

A woman was charged before justices with an offence in respect of which, if it was a first offence, she was liable on summary conviction to be imprisoned for a term not exceeding three months. In the course of the hearing evidence was given by the prosecution that the defendant had been previously convicted of a like offence, and thereupon she became liable on conviction to be imprisoned for a term exceeding three months. The justices, without giving her the option prescribed by the above section, convicted the defendant and sentenced her to three months' imprisonment:—

Held by Walton and Jelf JJ. (Lord Alverstone C.J. dissenting), that the justices had no jurisdiction to treat the case as one of a first offence; that the words "before the charge is gone into" mean in such a case "before the charge in its altered character is proceeded with"; and that, as the justices had not, upon the evidence of the previous conviction being given, asked the defendant if she wished to be tried by a jury, the conviction was bad.

RULES for a certiorari to justices of Birmingham and to the recorder of Birmingham to quash certain convictions.

Two women named Fanny Grey and Sarah Grimmett were brought before a Court of summary jurisdiction at Birmingham upon informations charging that they on November 13, 1908, did unlawfully keep a certain brothel at certain premises in the said city contrary to s. 13, sub-s. 1, of the Criminal Law Amendment Act, 1885. After hearing the evidence the justices intimated that they found the charge to be proved, and before pronouncing sentence they inquired if anything was known of

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the women, and were informed by a constable, not upon oath, that they had both been convicted on three previous occasions of the same offence and fined. They then asked their clerk what was the maximum penalty for the offence and were told that it was three months' imprisonment with or without hard labour. They accordingly ordered the women to be imprisoned for three months in the second division. The said Fanny Grey and Sarah Grimmett were not given the option of being tried by a jury, nor were they informed of their right to be so tried. The women appealed against the conviction to the quarter sessions for the city of Birmingham. At the hearing of the appeals counsel for the appellants contended that, as the justices had received evidence of the previous convictions, whereby the appellants became liable to be imprisoned for four months (1), and omitted to inform the appellants of their right to be tried by a jury as provided by s. 17 of the Summary Jurisdiction Act, 1879 (2), the convictions were bad in law. The recorder overruled the objection and affirmed the convictions. Rules having

(1) By s. 13 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), "Any person who keeps or manages . . . . a brothel . . . . shall on summary conviction in manner provided by the Summary Jurisdiction Acts be liable

"(1.) to a penalty not exceeding 20*l.*, or in the discretion of the Court to imprisonment for any term not exceeding three months with or without hard labour, and

"(2.) on a second or subsequent conviction to a penalty not exceeding 40*l.*, or in the discretion of the Court to imprisonment for any term not exceeding four months with or without hard labour."

(2) By s. 17 of the Summary Jurisdiction Act, 1879, sub-s. 1, "A person when charged before a Court of summary jurisdiction with an offence, in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months, and which is not an assault, may, on appearing before the Court, and before the charge is gone into but not afterwards, claim to be tried by a jury, and thereupon the Court of summary jurisdiction shall deal with the case in all respects as if the accused were charged with an indictable offence and not with an offence punishable on summary conviction."

Sub-s. 2: "A Court of summary jurisdiction before the charge is gone into in respect of an offence to which this section applies, for the purpose of informing the defendant of his right to be tried by a jury in pursuance of this section, shall address him to the following effect: 'You are charged with an offence in respect of the commission of which you are

been obtained by the appellants to bring up the convictions to be quashed,

McCardie, for the justices, shewed cause. The appellants were not "charged" with an offence in respect of the commission of which they were liable to be imprisoned for a term exceeding three months. The previous conviction was not mentioned in the summons nor in the opening of the case, and it was not till after the case was closed and the justices had in fact convicted that the previous conviction was brought to their notice, and then only in answer to their inquiries. Even then the justices and their clerk treated the case as one of a first offence, for the clerk informed them that the maximum penalty was three months, and they inflicted that penalty and no more. As it remained throughout a charge of a first offence and nothing more, it did not come within the words of s. 17 of the Summary Jurisdiction Act, 1879. The case is covered by the authority of *Reg.* v. *Fowler* (1), where the facts were identical with those in the present case. There a defendant was charged, as here, under the Criminal Law Amendment Act with keeping a brothel, and after conviction, but before sentence, the justices required information as to the defendant's character, and were informed by a constable, not on oath, that she had been previously convicted of a similar offence. The justices imposed a fine of 20*l.*, or in default two months' imprisonment. Under those circumstances it was held by Mathew and Charles JJ. that the defendant was not entitled to a trial by jury and that the conviction was good, inasmuch as the justices had "dealt with the charge as for a first offence."

Avory, *K.C.*, and *Cotes Preedy*, in support of the rule. The offence with which the defendants were charged was that of keeping a brothel, and that was an offence which, as soon as the justices discovered the fact of the previous convictions, became

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entitled, if you desire it, instead of being dealt with summarily, to be tried by a jury; do you desire to be tried by a jury?' with a statement, if the Court think such statement desirable for the information of the person to whom the question is addressed, of the meaning of being dealt with summarily, and of the assizes or sessions (as the case may be) at which such person will be tried if tried by a jury."

(1) (1894) 64 L. J. (M.C.) 9.

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punishable with more than three months' imprisonment, whether the previous conviction was referred to in the information or not. It is true that when the charge was opened the justices did not know that the defendants had in fact been previously convicted, but they knew that there was a possibility of their having been so convicted, and that the charge might involve a liability to imprisonment for more than three months. They therefore ought to have given them a conditional caution, "If you have been previously convicted you are entitled to be tried by a jury." It is in such a case a condition precedent to the jurisdiction of the justices that the defendant should be informed of his right to be so tried. The justices are bound so to inform him even though they know that he means to plead guilty, and the absence of that information will, even after a plea of guilty, make the conviction bad: *Reg.* v. *Cockshott.* (1) Wright J. there said: "I think it would be wrong to fritter away the protection which the section intends to give to accused persons. It intends to give them protection in the broadest and most generous way by providing that the option of trial by jury shall be put before any accused person before the charge is gone into. I think the option ought to be put before him before he is asked whether he pleads guilty or not guilty."

[LORD ALVERSTONE C.J. If no one but the defendant knows of the previous conviction and she is silent about it until after she has been convicted and sentenced to three months' imprisonment, can she then rely on the previous conviction and say that the second conviction was bad for want of the statutory caution?]

Yes. The defendants go that length. The case of *Reg.* v. *Fowler* (2), in that it decided that the justices may treat a second offence as if it were a first offence, was wrong. Suppose a case in which the defendant, knowing the law, upon being called on to plead, claimed to be tried by a jury upon the ground that she had been previously convicted. Surely the justices could not give themselves jurisdiction by simply saying that they would treat it as a first offence. In *Murray* v. *Thompson* (3), on the hearing of a summons for keeping a dog without a licence, the penalty for

(1) [1898] 1 Q. B. 582. (2) 64 L. J. (M.C.) 9.
(3) (1888) 22 Q. B. D. 142.

which offence is a fixed sum of 5*l.*, it was proved that the defendant had been previously convicted of that offence, but the previous conviction was not stated in the information. It was held that the justices had no power to treat it as a first offence and reduce the amount of the penalty under the provisions of s. 4 of the Summary Jurisdiction Act, 1879, relating to first offenders. That case shews that the omission to state a previous conviction in the information does not justify the justices in disregarding it and treating the case as one of a first offence. As soon as a defendant is in peril of the larger punishment she ought to be given the option of trial by jury, and the justices cannot by deciding to treat the case leniently deprive her of that right. Here the justices, when they found out that the defendants had been previously convicted, ought at that stage of the case to have given them the option, as they had not done so at a previous stage. It is true that s. 17 says that the defendant's right to claim a trial by jury must be exercised "before the charge is gone into but not afterwards." But no objection could have been validly taken on the score that it was then too late for the option to be exercised, for the proceedings up to that stage were void as being coram non judice for want of the statutory caution, and the charge had consequently never been gone into at all. The justices ought to have offered to begin de novo.

McCardie, in reply. In *Murray* v. *Thompson* (1) the previous conviction was proved on oath. Here it was not. It was no part of the case for the prosecution; there was no legal evidence of it. In *Reg.* v. *Cockshott* (2) the offence charged was that of keeping a betting-house, an offence which is, without more, punishable with six months' imprisonment. Therefore on the face of the information the case was one which came within s. 17 of the Act of 1879.

LORD ALVERSTONE C.J. I am sorry that the Court is not agreed in this matter. For myself I think the rules should be discharged. There is direct authority upon the point, and that authority I think quite right, but I will deal with the matter first on principle. Sect. 17 of the Summary Jurisdiction Act,

(1) 22 Q. B. D. 142. (2) [1898] 1 Q. B. 582.

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1879, provides as follows: [His Lordship read sub-ss. 1 and 2.] It seems quite clear that it was intended by that section that the information as to the right of trial by jury should be given to the defendant before the charge was gone into at all. But then it is contended that when the justices, who had no reason to suppose the case was one to which the section applied, have heard the case and are about to consider what punishment shall be inflicted, if it is brought to the notice of the Court (I am not going to draw any distinction between sworn and unsworn evidence—I will treat this case as if the statement was upon oath) that the defendant has been previously convicted, all the proceedings are to be of no effect, and the justices must begin over again, and they must give the defendant the option of letting the case go for trial. I cannot think that that was what the statute meant. If it did it would lead to the consequence, from which Mr. Avory does not shrink, that a person may take his chance of acquittal before the magistrates, knowing perfectly well that he has been previously convicted, and then, when he has been convicted, say "I have been previously convicted, no option of trial by jury was given to me, and the whole proceedings are therefore bad." That seems to me a most unreasonable conclusion. I quite agree that it does not matter at what stage the fact of the previous conviction comes to the knowledge of the justices if they do in fact entertain the charge of the greater offence. I agree that, although it is not so charged in the information, if the prosecution orally charge, or the justices deal with the accused on the basis of the graver offence, the proceedings would be bad. But at least the defendant must stand charged in one way or another with an offence for which he can be sentenced to more than three months' imprisonment. If he has never been so charged, in my opinion the section was not intended to limit the well-known power of magistrates to make inquiries after conviction as to the character of the defendant with a view to passing the appropriate sentence. In the present case it is clear that the defendants were never charged at any stage of the proceedings with having committed the offence after a previous conviction; and in my opinion the mere disclosure of a previous conviction cannot turn a charge of a first offence into a charge of a second offence.

Therefore the condition of s. 17 of the Summary Jurisdiction Act has not been satisfied. I should have arrived at this conclusion independently of authority upon the language of the section itself. But the matter is directly covered by the authority of *Reg.* v. *Fowler* (1), and we ought not to throw any doubt upon that decision unless there is clear ground for saying that the judges there came to a wrong conclusion. There the defendant was convicted under the same section as the present defendants, and before passing sentence the justices requested information as to her character. A police constable, not on oath, and without legal proof of the fact, reported that she had been previously convicted of a similar offence, whereupon the justices imposed a fine, or in default imprisonment for two months. A rule to quash the conviction was discharged, Mathew J. observing that, as the justices had dealt with the charge as for a first offence, "the occasion never arose for warning the defendant in the terms provided by s. 17 of the Summary Jurisdiction Act, 1879, that she might choose to be committed for trial by jury." It is said that that case is inconsistent with *Murray* v. *Thompson*. (2) But if there is any inconsistency between them, which I have great difficulty in seeing, for no question of a right to trial by jury was raised in the latter case, it is to be observed that that case was argued on one side only, the respondent not being represented by counsel. Then came the case of *Reg.* v. *Cockshott*. (3) But that case is clearly distinguishable from the present. It was not disputed there that the offence with which the man was charged, that of keeping a betting-house, was one in respect of which he was entitled to a trial by jury. After the charge had been gone into he pleaded guilty, and it was held that, as he had not been informed as to his right of trial by jury, the conviction was bad. In my opinion that case has no bearing whatever on the present, where the whole question in dispute is as to what was the charge. In my opinion these rules ought to be discharged.

WALTON J. I much regret that I am not able to satisfy myself that the decision in *Reg.* v. *Fowler* (1) was right, and that in

(1) 64 L. J. (M.C.) 9. (2) 22 Q. B. D. 142.
(3) [1898] 1 Q. B. 582.

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consequence I have to differ from my Lord. It seems to me that the intention of s. 17 was that wherever the charge is such that the person charged is in peril of a sentence of imprisonment for more than three months he should be entitled to claim to be tried by a jury and not summarily. It was contended by Mr. Avory that in every case in which there is a charge of an offence in respect of which a person who has been previously convicted of a similar offence could be sentenced to more than three months' imprisonment the justices ought, immediately upon the case being opened, to put to him the question prescribed by sub-s. 2 in a conditional form, that is to say, to ask him whether in the event of his having been previously convicted he desires to be tried by a jury. But I cannot go as far as that. I do not think that s. 17 requires that in a case like the present, where the information is silent as to the previous conviction, the justices should give the warning as to the mode of trial as soon as the case is called on. Further, I am satisfied that in such a case, where the information says nothing about the previous conviction, the Legislature did not intend that as soon as the case is opened the defendant, if he wishes to have the benefit of the option as to the mode of trial, should interpose and inform the Court of his previous conviction. I do not think there is anything in the section which points to that conclusion. But Mr. Avory next contended that where nothing is said in the information about the previous conviction, but in the course of the hearing evidence is given on behalf of the prosecution that there has been a previous conviction, the justices must give the warning, and the person charged has the option of being tried by a jury. With diffidence and not without hesitation I have come to the conclusion that that contention is sound. In the present case evidence was given on behalf of the prosecution of previous convictions. Upon that evidence being given the justices were not only entitled to pass a sentence of more than three months' imprisonment, but in my opinion they were bound to consider whether they ought not to pass it. From that moment the position of the persons charged was altered; they became in peril of the heavier sentence, and under those circumstances became entitled to the benefit of the section. In coming to this

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conclusion I am aware that I am differing from the judgment in *Reg.* v. *Fowler* (1), a case which is not distinguishable from the present. That judgment was apparently rested upon the ground that the justices dealt with the charge as for a first offence, but that to my mind is immaterial. The question is not as to what was passing in the justices' minds, but whether the defendant was in peril of the heavier sentence. It is to be observed with regard to that case that the precise effect of s. 17 was not then so carefully considered as it was in the later case of *Reg.* v. *Cockshott*. (2) I do not mean to say that those cases are not quite distinguishable in their facts, but as far as I know it was in *Reg.* v. *Cockshott* (2) that it was for the first time pointed out that the giving of the warning by the justices to the person charged was a condition precedent to the validity of the further proceedings. I cannot think that that was sufficiently brought to the attention of the Court in *Reg.* v. *Fowler*. (1)

It must not be assumed that anything I have said involves the conclusion that a defendant may keep silent throughout the hearing and allow the case to be finished and sentence to be passed without mention of any previous conviction, and then afterwards take the objection that he had not been given the proper warning and that the conviction is therefore bad. What I have said only applies where the previous conviction is proved by the prosecution, but where it is so proved I think it is essential that the warning should be given. It may be that this involves the result that, if on the warning being given during the hearing of the case the defendant elects not to be tried by a jury, the proceedings may have to be formally commenced de novo. But I do not think there is any great inconvenience in that, and if there is, I do not think we ought on that account to deprive the person charged of the right which the statute intended he should have. For these reasons I think the case of *Reg.* v. *Fowler* (1) was not rightly decided, and that these rules ought to be made absolute.

JELF J. I agree with the judgment of my brother Walton that the rules should be made absolute, and I need hardly

(1) 64 L. J. (M.C.) 9. (2) [1898] 1 Q. B. 582.

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say that I do so with great diffidence, as I am therein differing from my Lord and also from the judges who decided the case of *Reg.* v. *Fowler*. (1) It is, I think, agreed by the whole Court that where the penal consequences of the offence which give rise to the obligation to give the warning to the person charged depend upon the existence of a previous conviction it is not necessary that the previous conviction should be stated in the information. I do not myself think that it is wrong that it should be so stated in the information, or that there is any serious objection to the magistrates having knowledge of that fact at the time of the hearing—I merely say that it is not necessary. Here the fact of the previous conviction was not stated in the information, nor had the justices any knowledge of it until the conclusion of the hearing and after they had made up their minds to convict. The case was opened and heard as being a charge in respect of a first offence. But when the justices came to consider the sentence they made inquiries as to the defendants' characters, and were then for the first time informed that they had been previously convicted. It seems to me that under those circumstances the whole position was changed, and that whereas up to that moment it was quite right for the justices to deal with the case themselves without giving any option to the accused persons, from that moment, inasmuch as it was then in their power to give the higher punishment whether they intended to do so or not, the character of the charge was altered and it became a charge entitling the accused to a trial by jury. The section requires, no doubt, that the claim to be tried by a jury should be made "before the charge is gone into," but I think that in such a case as the present the word "charge" must be taken to mean the charge as developed and in its altered character. I must say I do not agree with Mr. Avory that the justices ought at the beginning of the case and before they have any notice of the previous conviction to give the defendant the prescribed warning in a conditional form, "If you have been previously convicted you are entitled," &c. But I see no difficulty in their telling the defendant at the later stage that, as the charge has

(1) 64 L. J. (M.C.) 9.

developed into one in respect of which he is in peril of imprisonment for more than three months, he is entitled at his option to be tried by a jury. The case of *Murray* v. *Thompson* (1) seems to me to be an authority to shew that, if in the course of the trial of a charge before justices the character of the charge changes and it becomes of a graver character, the justices are bound to treat the graver charge as *the* charge which is being inquired into, and have no discretion to deal with the case as if they had before them only the lighter charge stated in the information. That seems to me to be the very point with which we have to deal here. Indeed the present case is in my view an a fortiori one, because the seriousness of the altered charge here gives a right, while in the other case it took away a privilege. The justices could not divest themselves of the responsibility of taking into consideration the heavier punishment which they were empowered by law to inflict, although in the exercise of their discretion they may not have considered it desirable to inflict it. The previous convictions may have in fact caused the justices to give the maximum of three months' imprisonment while trying to keep their jurisdiction by not giving more.

Rules absolute.

Solicitors for justices: *Sharpe, Pritchard & Co., for Carter, Birmingham.*

Solicitors for defendants: *Judge & Priestley, for Philip Baker & Co., Birmingham.*

(1) 22 Q. B. D. 142.

J. F. C.

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Jan. 14, 18;
Feb. 15.

DIXON *v.* BLACKPOOL AND FLEETWOOD TRAMROAD COMPANY.

Justices—Poor Rate—Non-payment of—Application for Distress Warrant—Sufficient Cause for Non-payment—Matter appealable to Quarter Sessions—Jurisdiction of Justices to go behind Rate.

A rate was made by a local authority under a local Act which provided that occupiers of land used only "as a railway constructed under the powers of any Act of Parliament for public conveyance" should be assessed in respect of one fourth part only of the value. The Act gave to any party aggrieved by a rate a right to appeal to quarter sessions. It also provided that if any person failed to pay the rate due from him he might be summoned before a justice, and if "no sufficient cause for the non-payment" of the rate should be shewn a distress warrant should be issued. The respondents were assessed to the above-mentioned rate on the aggregate rateable value of a tramroad and certain other property. A demand note for the amount of the rate was served on the respondents, in which they were charged on the full rateable value of the whole hereditaments, but they did not appeal to quarter sessions. A summons having been issued against them for non-payment of the rate, it was admitted by the local authority that, on the assumption that a decision of the Court of Appeal then under appeal to the House of Lords was correct, so much of the respondents' rateable hereditaments as consisted of a tramroad was a railway of the kind mentioned in the local Act, and that the respondents should have been charged on one fourth part only of its value. The parties also agreed the sum to which the demand should on the above assumption have been reduced. Under these circumstances the justices refused to issue their distress warrant for the full amount of the demand note:—

Held by Lord Alverstone C.J. and Walton J. (Bigham J. dissenting), that the respondents had shewn sufficient cause for the non-payment of the larger amount, and that the justices were justified in their refusal.

By Bigham J., that the objection to the assessment was matter of appeal to the quarter sessions, and could not be taken before the justices on an application for a distress warrant.

Case stated by justices for the county of Lancaster.

1. A complaint was on February 6, 1908, preferred by the appellant, the assistant overseer of the urban district of Fleetwood, against the respondents charging that the respondents being duly assessed under the Fleetwood Improvement and

Market Act, 1842 (1), had not paid the following sums due from them in respect of rates, namely, 493*l.* 15*s.* 8*d.* for general improvement rate dated July 1, 1907, and 32*l.* 4*s.* for special improvement rate of the same date.

The hereditaments in respect of which these two rates were charged were described in the valuation list and rate-book as "Tramway lines and equipment" of a rateable value of 2232*l.*, and "Tramsheds, station, waiting rooms &c." of a rateable value of 344*l.* 5*s.*, making a total rateable value of 2576*l.* 5*s.* The respondents were the owners and occupiers of a tramroad, that is to say, a system of tramway lines laid upon private land, and also, in connection therewith, of a tramway, that is to say, a system of tramway lines laid in the public streets. The tramroad and tramway formed one continuous system. The hereditaments so described as "Tramway lines and equipment" included the whole of the tramway system occupied by the respondents in the urban district of Fleetwood, a portion of which consisted of a tramroad and a portion of a tramway. With regard to so much as consisted of a tramway in the strict sense of the term it was not disputed that the respondents were rightly charged on the full rateable value, and it was with

(1) By the Fleetwood Improvement and Market Act, 1842 (5 & 6 Vict. c. xlix.), s. 250, power was given to the commissioners to levy rates.

By s. 266, any person "aggrieved by any rate" made under the authority of the Act was given a right of appeal to quarter sessions.

By s. 270, "If any person rated under the authority of this Act shall not pay any of the rates due from him for the space of fourteen days after demand thereof . . . . any justice shall on the application of the commissioners or their collector summon any such person to appear before him . . . . to shew cause why the rates due from him should not be paid; and in case no sufficient cause for the non-payment of such rate shall be shewn accordingly, the same shall be levied by distress, and such justice shall issue his warrant accordingly."

By art. 3 of the Fleetwood Order, confirmed by the Provisional Orders Confirmation (No. 9) Act, 1882 (45 & 46 Vict. c. ciii.), it was provided as an amendment of s. 250 of the above-mentioned Act that "the occupier of any land . . . . used only . . . . as a railway constructed under the powers of any Act of Parliament for public conveyance shall be assessed in respect of the same in the proportion of one fourth part only of the sums to be rated or assessed on the other properties to be charged in each rate or assessment made by virtue of the local Act as hereby amended."

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reference only to so much as consisted of a tramroad that the present appeal was brought.

2. It was admitted that the rates had been properly made and duly demanded from the respondents, but the respondents contended that they were liable to be assessed in respect of the tramroad in the proportion of one fourth part only of the sums to be rated or assessed on the other properties to be charged in the rate or assessment made by virtue of the said local Act.

The rate-book and the demand note respectively contained a column applicable to property chargeable at one fourth of the value, but in neither was that column filled up.

3. The respondents contended that the tramroad was a railway constructed under the powers of an Act of Parliament for public conveyance, and as such the respondents were entitled to be rated in respect of the same in the proportion of one fourth part only of the sums rated or assessed on the other properties charged in the said rates in accordance with the provisions of s. 250 of the said local Act as amended by art. 3 of the provisional order made by the Local Government Board dated May 22, 1882, and confirmed by the Local Government Board's Provisional Orders Confirmation (No. 9) Act, 1882, and in support of their claim quoted the decision of the Court of Appeal in the case of *Blackpool and Fleetwood Tramroad Co.* v. *Thornton Urban District Council* (1), in which it was held that the portion of the said tramroad within the urban district of Thornton was a railway for the purpose of s. 211, sub-s. 1 (*b*), of the Public Health Act, 1875, which contains a proviso similar to art. 3 of the said provisional order.

4. It was admitted by the appellant that the portion of the tramroad within the urban district of Fleetwood was a continuation of the same tramroad as was the subject of the decision of the Court of Appeal in the case lastly before mentioned.

5. It was contended on behalf of the appellant that notwithstanding the said decision of the Court of Appeal the justices were bound to make an order for payment of the full amount claimed, and that if the respondents were aggrieved by the rate made under the authority of the said local Act appeal should

(1) [1907] 1 K. B. 568.

have been made to the next quarter sessions under s. 266 of the local Act.

6. It was contended on behalf of the respondents that they were not aggrieved by the assessment, but claimed to be liable to pay on one fourth part only of the net annual value of the tramroad, and that they, the respondents, had shewn cause why the rate claimed from them should not be paid.

7. The justices were of opinion that the respondents had shewn sufficient cause for non-payment of the full amount of the rate claimed, and the appellant's and respondents' solicitors having agreed that the amount of one fourth part of the net annual value of the tramroad reduced the rate thereon to 255*l.* 15*s.* 8*d.* (1), the justices, under the Summary Jurisdiction Act, 1879, made an order for the respondents to pay to the appellant the said sum of 255*l.* 15*s.* 8*d.* and 5*s.* 6*d.* for costs forthwith, and if default was made in payment according to the said adjudication and order it was ordered that the said sum thereunder be levied by distress and sale of the goods of the respondents.

8. The question for the opinion of the Court was whether upon the above facts they came to a correct determination in point of law.

W. Ryde, for the appellant. If the demand note served upon the respondents was excessive their remedy was by way of appeal to the sessions. The objection could not be taken before the justices on an application to enforce payment by distress. In *Churchwardens of Birmingham* v. *Shaw* (2) the president of a society, which claimed to be a literary and scientific society and as such exempt from poor rates by virtue of 6 & 7 Vict. c. 36, on being summoned for non-payment of poor rates, relied upon the exemption. It was held that he ought to have appealed to quarter sessions and could not contest his liability on the application for a distress warrant. Lord Denman C.J., delivering the judgment of the Court, there laid it down that the only

(1) This figure of 255*l.* 15*s.* 8*d.* was arrived at by measuring the portion of tramroad and the portion of tramway in the district and making an apportionment on that basis.

(2) (1849) 10 Q. B. 868.

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objections to a rate which could in such a case be taken before the justices were objections which went to the jurisdiction of the overseers to make the rate, such as non-occupation of the premises by the person rated, or that they were not within the parish, or that the occupation was not beneficial, and did not extend to a statutory exemption by reason of the purposes for which the occupation was had. That case, which was decided sixty years ago, has never been questioned. And the principle of it equally applies whether the rate is a poor rate or a district rate, and whether the exemption is from the whole of the rate or only, as here, from three-fourths. In *Sandgate Local Board* v. *Pledge* (1), where an application was made to justices to enforce payment of a general district rate under the Public Health Act, it was held that, the rate being good on the face of it, the justices could not go behind it to inquire whether there was not a concurrent rate in existence for the same purposes. In *Reg.* v. *Hannam* (2) the occupiers of certain property within the district of Ramsgate set up in answer to a summons for non-payment of a general district rate that the premises were situate within the harbour and as such were exempt from all rates by virtue of a local Act. It was held that, as the objection could have been taken on appeal, the justices had no power to entertain it, and a rule was made absolute ordering them to issue their warrant. In that case Bowen L.J., after saying that the true rule had been laid down in *Churchwardens of Birmingham* v. *Shaw* (3), and after referring to the exceptions there specified by Lord Denman to the general rule that justices cannot inquire into matters of excuse for non-payment of a rate, said: "I desire to reserve a further possible exception, upon which I express no opinion, namely, where the exception from rating is enacted by a public Act of Parliament of which the whole world has notice, and which the rating authority must or ought to know, and which as soon as the statute is read destroys the rateability without throwing any onus upon the occupier of proving anything so as to gain the exemption for his property. I am not sure whether the justices

(1) (1885) 14 Q. B. D. 730. (2) (1886) 34 W. R. 355.
(3) 10 Q. B. 868.

may not in that case refuse to enforce the rate." That passage has since been treated, in *Rayner* v. *Drewitt* (1), as if it were a ruling. But that is a mistake. Bowen L.J. expressed no opinion upon the matter. In *Bates* v. *Plumstead Overseers* (2) it was held that on an application for a distress warrant to enforce a sewers rate under a certain Act, the rate being good on the face of it, the magistrate could not entertain an objection that the expenses ought to have been recovered under another Act, in which case the property rated would have been exempt. Similarly in *Westminster Corporation* v. *Army and Navy Auxiliary Co-operative Supply* (3) it was held that on an application for a distress warrant to recover the balance of a rate the objection that the rating authority had not given the respondents notice of an increase in the value of their premises in the valuation list as required by s. 9 of the Valuation (Metropolis) Act, 1869, could not be taken, such an objection being admissible only on appeal. The case of *Rex* v. *Trecothick* (4) applied the same principle to an objection that a lighting and watching rate did not follow the poor rate as required by the local Act under which it was made. And the same thing was held in *Reg.* v. *Newman* (5) with reference to an objection by a person assessed to a sewers rate that he derived no benefit from the sewers. That case was decided under s. 103 of the Public Health Act, 1848, which was identical with s. 270 of the Fleetwood Improvement and Market Act, 1842, and provided that a distress warrant should issue if "no sufficient cause for non-payment be shewn." There are, it must be admitted, two cases in which on an application for a distress warrant objections that the respondents were partially exempt from the payment of the rate under s. 211 of the Public Health Act, 1875, were allowed to be taken before the magistrates, and a case having been stated, the objection was carried up to the House of Lords on appeal and there decided: *Hampton Urban Council* v. *Southwark and Vauxhall Water Co.* (6); *Wakefield Corporation* v. *Wakefield and District Light Railway.* (7) But

(1) (1900) 82 L. T. 718.
(2) (1895) 59 J. P. 118.
(3) [1902] 2 K. B. 125.
(4) (1834) 2 Ad. & E. 405.
(5) (1860) 29 L. J. (M.C.) 117.
(6) [1900] A. C. 3.
(7) [1908] A. C. 293.

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the question of the jurisdiction of the magistrates to entertain the objection or state the case was not raised, and the decision of the Lords is not of any binding authority on this point: *Kydd* v. *Liverpool Watch Committee.* (1)

Palmer, for the respondents. The justices sitting for the purpose of hearing an application for a distress warrant for non-payment of rates sit as a Court of summary jurisdiction under s. 13, sub-s. 11, of the Interpretation Act, 1889 (52 & 53 Vict. c. 63); their duties are not merely ministerial, and they are authorized to inquire into the validity of objections taken by the party summoned and to state a case for the opinion of the High Court: *Fourth City Mutual Building Society* v. *Churchwardens of East Ham.* (2) It was in recognition of the correctness of that view that in the Hampton and Wakefield cases that went up to the Lords no objection was taken to the jurisdiction. But whether that view be right or not, all the authorities concede that any objection which goes to the jurisdiction of the overseers to make the rate may be taken before the justices. Erle C.J. in *Pedley* v. *Davis* (3), while approving the decision in *Churchwardens of Birmingham* v. *Shaw* (4), points out that in that case "the distinction is clearly taken between cases on the one hand where there is jurisdiction to make the rate and the party has a ground of appeal against a rate made with jurisdiction, and cases on the other hand where there was no jurisdiction to make the rate, and so no jurisdiction to issue the distress warrant." The question whether a rating authority can assess to a general district rate at its full value land of the kind which is entitled to a deduction of three fourths goes to their jurisdiction. In *Reg.* v. *Barclay* (5), where the local authority rated an owner to a general district rate in respect of his premises, whether occupied or unoccupied, and assessed them at two-thirds of their rateable value instead of one half as provided by s. 211 of the Public Health Act, Cave J. expressed the opinion that the objection was one which could be raised before the magistrates, inasmuch as it went to the right to rate altogether. So too in *Fourth City Mutual Building*

(1) [1908] A. C. 327.
(2) [1892] 1 Q. B. 661.
(3) (1861) 10 C. B. (N.S.) 492.
(4) 10 Q. B. 868.
(5) (1881) 8 Q. B. D. 306.

Society v. *Churchwardens of East Ham* (1) A. L. Smith J. said that the justices "ought to have inquired whether any statute existed under which the rate could be levied upon an owner instead of an occupier, and whether, if so, the provisions of the Act had been complied with." Unless the provisions as to allowing a deduction of three fourths of the rate of a railway have been complied with there is no jurisdiction to make the rate as regards the railway. There was in the present case a "sufficient cause for non-payment" of the rate, for when once it was admitted that the tramroad was entitled to a three-fourths exemption as being a railway, and the amount of the proper demand upon that basis was agreed, there was nothing left to dispute about, and therefore nothing involving an inquiry. In *Sheffield Waterworks Co.* v. *Sheffield Corporation* (2) the appellants were summoned for non-payment of a rate based on a valuation which since the making of the rate had been reduced by the assessment committee. It was held that there was "sufficient cause" for non-payment within the meaning of s. 256 of the Public Health Act, 1875, the language of which section is identical with that of s. 270 of the Fleetwood Act. The Court distinguished the case of *Sandgate Local Board* v. *Pledge* (3) upon the ground that in that case there was matter in dispute which would have involved an inquiry, whereas in the Sheffield case there was nothing in dispute when the time came for the appellants to be called upon to pay. In *Davis* v. *Woodfield* (4) the appellant was charged a larger proportion of a rate than he was legally liable for. Channell J. said, "It is clear that they (the justices) cannot issue a distress warrant for the full amount where the statute says the occupier is only to be liable for less."

Ryde, in reply. *Davis* v. *Woodfield* (4) is not in point. There the length of the appellant's occupation was in dispute, which is the same thing as non-occupation. Under the Fleetwood Act the distress warrant may be issued by one justice. It can hardly have been the intention of the Legislature that what might turn out to be a difficult question of liability should be decided by a single justice without appeal.

Cur. adv. vult.

(1) [1892] 1 Q. B. 661.
(2) (1885) 55 L. J. (M.C.) 40.
(3) 14 Q. B. D. 730.
(4) (1900) 81 L. T. 782.

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Feb. 15. LORD ALVERSTONE C.J. read the following judgment:—This was a case stated on a summons taken out by the appellant, the assistant overseer of the urban district of Fleetwood, against the respondents, the Blackpool and Fleetwood Tramroad Company, calling upon the justices to issue a distress warrant in respect of two rates amounting together to 525*l.* 19*s.* 8*d.* The rates were a general improvement rate and a special improvement rate, and were levied under the Fleetwood Improvement and Market Act, 1842, as amended by the Fleetwood Provisional Order, 1882. The Act of 1842 by s. 250 enabled rates to be made upon the occupiers of, amongst other things, railways, lands, tenements, and hereditaments, with a proviso reducing the amount payable in the case of arable, meadow, and other land. No reduction was made in favour of railways by that Act, but by art. 3 of the Provisional Order, 1882, the proviso to s. 250 in favour of arable, meadow, and pasture grounds or woodlands and plantations was repealed, and it was provided that in lieu thereof the occupiers of any land used only as a railway constructed under the powers of any Act of Parliament for public conveyance shall be assessed in respect of the same in the proportion of one fourth part only. By s. 264 the Act of 1842 gave an appeal to special sessions, and by s. 266 an appeal to quarter sessions in the usual form. Sect. 270 provided that if any person rated under the authority of the Act should not pay any of the rates due from him for a space of fourteen days after demand it should be lawful for the commissioners to recover the same by action of debt, or any justice might summon any such person to appear before him to shew cause why the rates due from him should not be paid, and in case no sufficient cause for the non-payment of such rates should be shewn the justice should issue his warrant to levy by distress. In the demand note the property was described as buildings and other hereditaments not being agricultural land and assessed at a rateable value of 2576*l.* 5*s.*, and the demand note was made at the full rate and not at one fourth. The demand note contained a column for charging in the case of properties liable to the lower rate, and a reference to the provisions of s. 250 of the Fleetwood Improvement and Market Act, 1842, as amended by the provisional order, was set

out on the demand note. The demand note was based upon a valuation list in which the property was described as "tramway lines and equipment," and the entries in the columns applicable to properties rateable at one fourth were not filled up. The rate was made on July 1, 1907, to meet expenses up to March 31, 1908. No appeal had been brought against the rate by the respondents, the tramroad company, but on the application for the issue of the distress warrant the respondents contended that they ought not to be called upon to pay the rate at the full rate, because in the month of January, 1907, the Court of Appeal decided that the portion of the tramroad within the urban district of Thornton was a railway, and it was admitted by the appellant that the portion of the tramroad within the urban district of Fleetwood was a continuation of the same tramroad. At the hearing before the justices it was agreed that if the decision of the Court of Appeal was applied to the assessment of property within the borough, the amount demanded, namely, 525*l.* 19*s.* 8*d.*, would be reduced to 255*l.* 15*s.* 8*d.*, and the justices issued their distress warrant for the lesser amount, but declined to issue a distress warrant for the larger.

On behalf of the overseers of the poor it was contended that, no appeal having been brought, and the rate being good on the face of it, it was not competent for the justices to enter into the question of the assessment of the rate so levied, or the question whether the rate should have been charged at one fourth only in respect of any part of the rateable hereditament, but were bound to issue the distress warrant for the full amount.

On the part of the respondents it was contended that, inasmuch as it was admitted that a portion of the tramroad within the urban district of Fleetwood was a continuation of the tramroad which had been held by the Court of Appeal to be a railway, sufficient cause had been shewn for the non-payment of the amount demanded, and that the justices were not bound to issue their warrant for the full amount.

The matter is, in my opinion, one of great difficulty, but upon the whole I come to the conclusion that the justices were right, and that sufficient cause had been shewn within the meaning of s. 270 for the non-payment of a larger amount than that in

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respect of which the distress warrant was ordered to issue. I think that within the principle laid down by Bowen L.J. in *Reg.* v. *Hannam* (1), to which I shall refer, as soon as it was admitted that the word "tramway" in the valuation list and demand note ought to have been "railway" and the corrected figure was agreed, the provisional order destroyed the rateability as appearing upon the valuation list without it being necessary for the respondents to prove anything further.

A very large number of authorities were cited before us, to all of which it is not necessary to refer, but there are some which require to be considered. Before doing so I will state the general principles which are, in my opinion, applicable to the case. It has been for many years decided in cases arising on applications for the issue of distress warrants for the payment of poor rates that, assuming the rate to be good on the face of it, the ratepayer cannot raise in answer to the application questions which ought properly to be raised by way of appeal, as, for instance, the amount of the rateable value at which the property is assessed, or that the property was exempt from rateability on the ground that it was a literary or scientific institution not carried on for gain. The principle of the cases with reference to the poor rate applies, in my opinion, to cases under the Public Health Act, or under a private Act of Parliament as in the present case. But in considering the application of the cases decided with reference to poor rates it is not, in my judgment, proper to overlook the fact that in this Act, as in the Public Health Act, the section enabling the justices to issue their distress warrant contains the words "in case no sufficient cause for the non-payment of such rate shall be shewn." Upon the face of the demand note, in respect of which the justices were called upon to issue their warrant, there appears the fact that land used for a railway constructed under the powers of an Act of Parliament was only liable to pay on one fourth of the rateable value, and if it was conceded by the overseer that the rateable hereditament described as "other hereditaments not being agricultural land" was in fact a railway, and the amount of the necessary correction consequent upon that fact was agreed

(1) 34 W. R. 355.

between the parties or in evidence before the justices, I think sufficient cause would be shewn for the justices to decline to issue their distress warrant for the full amount. It becomes then necessary to consider what the admission in the case was. It is quite true that the admission, as stated in paragraph 4, was only to the effect that the portion of the tramroad within the urban district of Fleetwood was a continuation of the same tramroad as was the subject of the decision of the Court of Appeal; but this must, I think, be supplemented by the statement made in paragraph 7 that it was agreed that the amount of one fourth part of the net annual value of the tramroad reduced the rate to 255*l.* 15*s.* 8*d.*; and Mr. Ryde, who appeared for the overseer, conceded that if the judgment of the Court of Appeal was to be applied to the rateable hereditament the amount demanded could not properly be claimed. If I had come to the conclusion that the admissions still left room for inquiry as to the effect upon the amount of the assessment of the fact that some part of the rateable hereditament within the Fleetwood urban district was a railway, and that that matter required investigation which could only be properly made upon an appeal, I should have come to the contrary conclusion.

It only remains for me to consider how far this decision is in accordance with such of the authorities as were cited before us as I think it necessary to notice. The general principle that persons cannot raise before magistrates in opposition to an application for the issue of a distress warrant objections which ought properly to be raised on appeal has been recognized for a great many years: see *Rex* v. *Trecothick* (1); and in the leading case of *Churchwardens of Birmingham* v. *Shaw* (2) it was decided that the question whether an institution was a literary or scientific society could not be raised in an action for replevin where a distress warrant had been executed: see also *Reg.* v. *Newman* (3); *Sandgate Local Board* v. *Pledge.* (4) It is to be observed that the statutes under which the application was made in those cases did not all contain the words which occur in s. 256 of the Public Health Act, 1875, and in s. 270 of the private Act, "in case no

(1) 2 Ad. & E. 405.
(2) 10 Q. B. 868.
(3) 29 L. J. (M.C.) 117.
(4) 14 Q. B. D. 730.

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sufficient cause for the non-payment of such rate shall be shewn." That these words confer some additional powers on justices to whom the application is made cannot, I think, be denied, having regard to some later authorities to which I have to call attention. The nearest approach to the enunciation of a principle to be applied in such cases is that contained in the judgment of Bowen L.J. in the case of *Reg.* v. *Hannam* (1), in which he applied to a case which arose under s. 256 of the Public Health Act the principle laid down in *Churchwardens of Birmingham* v. *Shaw* (2), reserving for further consideration the case "where the exemption from rating is enacted by a public Act of Parliament of which the whole world has notice, and which the rating authority must or ought to know, and which as soon as the statute is read destroys the rateability without throwing any onus upon the occupier of proving anything so as to gain the exemption for his property." The matter was further considered in the case of *Sheffield Waterworks Co.* v. *Sheffield Corporation* (3), upon an application for a distress warrant to enforce the payment of a district rate made under s. 256 of the Public Health Act, in which, although the rate was good upon the face of it, it was brought to the attention of the magistrate that since the making of the rate an appeal had been lodged against the poor rate valuation on which the district rate was based. The appeal had not been disposed of and was still pending when the application for the distress was made. The ratepayers had offered to pay upon the old valuation list and to keep an account so that the amount might be adjusted when the ultimate valuation was determined. Mathew and A. L. Smith JJ., sitting in the Queen's Bench Division, held that good cause had been shewn for non-payment of the whole of the rate within the meaning of s. 256 of the Public Health Act, 1875. And in the case of *Fourth City Mutual Building Society* v. *Churchwardens of East Ham* (4) the same learned judges allowed the question whether the owners ought to have been rated instead of the occupiers to be raised in opposition to the application for a distress warrant: see also

(1) 34 W. R. 355, at p. 356.
(2) 10 Q. B. 868.
(3) 55 L. J. (M.C.) 40.
(4) [1892] 1 Q. B. 661.

Overseers of Norwood v. *Salter*. (1) The cases of *Davis* v. *Woodfield* (2) and *Mansel* v. *Itchen Overseers* (3) do not appear to have any direct bearing upon the point under consideration, as the question in those cases was to a certain extent one of occupation. A number of other authorities were cited before us, but I do not think it necessary to consider them, as they do not in my opinion carry the argument any further than I have already stated.

I have already referred to the description of the property in the demand note. The description of the property in the rate-book was as follows: "Tramway lines and equipment." The figure in the full rateable value column was 2232*l*. The column relating to claiming the rate at one fourth was not filled up. It seems to me that having regard to the admissions to which I have already referred in the earlier part of this judgment, namely, that the tramroad was in fact a railway within the decision of the Court of Appeal, and that therefore by the terms of the provisional order, which has the authority of an Act of Parliament, rateable at only one fourth, the case falls within the principle laid down by Bowen L.J. in *Reg.* v. *Hannam* (4) and within the authorities to which I have referred, of which *Sheffield Waterworks Co.* v. *Sheffield Corporation* (5) is an example, and that the magistrates were right in declining to issue a distress warrant for the full amount in this case, and the appeal should be dismissed. I express the above opinion with great diffidence, as my brother Bigham takes a different view, but we do not differ on any matter of law. It seems to me that without overruling the decision in the *Sheffield Waterworks Case* (5), assuming the agreed correction in the demand note to be made, we cannot review the decision of the justices.

BIGHAM J. read the following judgment:—The question in this case turns upon the meaning to be given to the words "sufficient cause" in s. 270 of the local Act. If the cause shewn was a sufficient cause within the meaning of that section, then the

(1) [1892] 2 Q. B. 118.
(2) 81 L. T. 782.
(3) [1906] 1 K. B. 221.
(4) 34 W. R. 355, at p. 356.
(5) 55 L. J. (M.C.) 40.

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magistrates were right in refusing to issue the warrant asked for; aliter if the cause was not sufficient within the meaning of the section, for in that case the duty of the magistrates was merely ministerial and they were bound to issue the warrant.

For the purpose of my judgment I will assume in favour of the respondents that had they appealed to quarter sessions they could have shewn that the tramroad was a railway within the meaning of s. 250 of the local Act as amended by art. 3 of the provisional order of May 22, 1882, and that the Court of quarter sessions would have held that the respondents were only liable to be assessed in respect of the tramroad in the proportion of one fourth part only of the sum assessed on the other properties to be charged to the rate. This assumption, in my opinion, gives full effect to the admissions made by the appellant before the magistrates as they appear in the case stated. But the question remains whether that was a matter which it was competent for the magistrates to entertain upon the application for a distress warrant. If it was not, it could not afford any cause at all for refusing the warrant, and still less sufficient cause. I am of opinion that it was not a matter which the magistrates could entertain, and upon the short ground that it might and ought to have been made the subject of appeal to quarter sessions. It is quite true that some matters which may form the subject of appeal to quarter sessions are cognizable by magistrates upon an application for a distress warrant, but the authorities shew that they are strictly limited to matters which demonstrate that the rate cannot affect or apply to the person against whom the warrant is asked for. Where the respondent can shew that the rate is bad on its face, and therefore a nullity, or where he can shew that the property in respect of which he is rated is not within the rateable area, or where he can shew that he is not the occupier of the property, the magistrates are entitled to say that "sufficient cause" has been shewn why no warrant should issue; and this although each one of these three matters might have formed the ground of an appeal to quarter sessions. The reason is that in such cases the facts shew that the rating authority could have had no jurisdiction to make the rate, and therefore could not

invoke the assistance of the magistrates to enforce it. In the case now before the Court it is admitted that the rate is good on its face, that the property is within the rateable area, and that the respondents are the occupiers. But in order to escape the difficulty created by the point that the objection taken before the magistrates was an appealable objection and not one which went to jurisdiction the respondents apparently contended (see paragraph 6 of the case) that they were "not aggrieved by the assessment, but claimed to be liable to pay on one fourth part only of the net annual value of the tramroad." This contention is, I think, quite untenable. Sect. 266 of the local Act provides that "if any person shall think himself aggrieved by any rate made under the authority of this Act or by any matters included in or omitted from the same" he may, subject to the giving of certain notices, appeal to quarter sessions. It is impossible to say that the assessment on the full value instead of on one fourth was not a grievance within the meaning of that section, so that the case remains one in which an appealable grievance not going to jurisdiction, because not coming under any of the three heads already mentioned, is being put forward as sufficient cause for not issuing the distress warrant. To say that the omission to rate the respondents on the lower basis is not an appealable grievance is in my opinion an attempt to take away the statutory jurisdiction of quarter sessions and to transfer it to the petty sessions, who have no appellate jurisdiction of any kind either by statute or otherwise. How are the magistrates to deal with such an objection? Are they to examine the provisions of the local Act? Are they then to ascertain the facts in order to see whether the provisions of the local Act apply, and are they finally to make the necessary arithmetical calculations in order to ascertain the exact amount for which the warrant should go? I think clearly not, for such considerations are and must be matters for appeal, just as an over-assessment would be matter of appeal. No doubt in this case there are admissions which were intended to save the justices the trouble of making such an inquiry in the event of their holding that they could enter on it at all. But admissions do not affect the question whether the justices have jurisdiction to enter upon the inquiry. The admissions merely

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take the place of evidence; they give no jurisdiction if none exists, and I am clearly of opinion that they were not intended or understood as affecting in any way the position of the present appellant when before the magistrates. I have said that in my opinion the authorities shew that "sufficient cause" is strictly confined to matter which strikes at the jurisdiction of the rating authority. The rating authorities have no power to make or to enforce a rate bad on its face. They have no power to rate any one when the property is outside the rateable area, nor to rate any one who is not an occupier.

I propose to refer to two or three of the authorities to support this view. The first is the case of *Churchwardens of Birmingham* v. *Shaw*. (1) That was a case of a poor rate, in which the words "sufficient cause" did not fall to be considered. But it was held that if an exemption was claimed on the ground that the respondents were a society supported by voluntary contributions within 6 & 7 Vict. c. 36, that was a matter for appeal to quarter sessions and could not be entertained by the magistrates upon an application for a distress warrant. It was argued that, the exemption being total, the rate was a nullity, but the Court held that, there being a remedy by appeal, and the rate being good on its face and made with respect to property within the rateable area and on the occupier, the magistrates' duty was to issue the warrant. Lord Denman C.J. there said: "The question . . . . is whether the acts of the overseers and justices in assessing the president to these rates were within their jurisdiction; if they were, they are valid now, because not reversed on appeal, and he cannot question them collaterally; if they were not, they were ab initio null and void, and he has done nothing which estops him from saying so. Now it is not disputed that he was the occupier of the premises in respect of which he is rated, nor that they are within the parish, nor is any question made as to the beneficial nature of the occupation; but the objection is that the statute exempts from the rate by reason of the purposes for which the occupation is had; and it is said that the effect of that exemption is to take the premises, for the purpose of rating, out of the parish, and so out of the jurisdiction of the justices, who are only

(1) 10 Q. B. 868.

allowing a rate made for the parish. But we think this mode of stating his case cannot be sustained; if it could, the same mode might be adopted wherever the question was whether the occupation was beneficial or not; if there be no beneficial occupier, the land for the purposes of the rate might equally be said not to be within the parish, because it ought not to be included in the rate; yet so far as we know this question has always been raised on appeal; and the distinction has been between the question whether occupier or not absolutely, which has been tried by action, and whether beneficial occupier or not, which has been tried by appeal. And this seems the reasonable test. As soon as the land is shewn to be in the parish, and A. B. to be the occupier, the case is prima facie brought within the statute of Elizabeth, the rate on its face is good, and jurisdiction attaches: whether that prima facie case can be answered by any circumstances affecting the character of the occupation, is matter to be determined by the court of appeal on appeal made. In the present case the party rated had many facts to prove, and a construction of a statute to make out, before he could establish his exemption; and the decision upon all those points was within the jurisdiction of the court of appeal, and, when decided in his favour, still shewed no excess of jurisdiction in the Court below, any more than a decision that the rate made and allowed was unequal; whereas a decision that the land was out of the parish would have shewn that ab initio the overseers and the justices below had been dealing with what they did not profess to deal with, and could not by law interfere with." The next case is *Reg.* v. *Hannam*. (1) The rate in that case was a district rate made within the meaning of s. 256 of the Public Health Act, 1875, a section which corresponds in its terms with s. 270 of the local Act now before us, so that the Court had to consider the effect of the words "no sufficient cause." The case was in the Court of Appeal. The head-note sufficiently states the effect of the judgment—"On an application before justices for an order for payment of a rate under s. 256 of the Public Health Act, 1875, the rate being good on the face of it, and the property in respect of which the occupier is rated being within the district of the rating authority, the

(1) 34 W. R. 355.

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justices' duty is merely ministerial, and they have no jurisdiction to inquire into the validity of the rate"—and the judgment of Bowen L.J. declares the law as laid down by Lord Denman in the *Birmingham Case.* (1) The only other case to which I need refer is *Sheffield Waterworks Co.* v. *Sheffield Corporation.* (2) It is said by the present respondents to be some authority against the argument that the matters cognizable by the magistrates are only such as go to the jurisdiction of the rating authority. When examined, however, it will be seen that A. L. Smith J. in giving judgment held in effect that the rate was bad on its face. The case was argued and decided just before the case of *Reg.* v. *Hannam* (3), but was apparently not reported in time to be cited in that case. If in fact it is in conflict with the decision in *Reg.* v. *Hannam* (3) it must, in my opinion, be disregarded. I think it is of importance that the duty of magistrates in cases of this kind should be strictly defined, and that no ground should be afforded for supposing that they may travel outside the limits of that duty.

WALTON J. I have experienced very considerable difficulty in arriving at a decision in this case, but I have, on the whole, come to the conclusion that the appeal ought to be dismissed. The case appears to me to be a peculiar one, not quite covered by any of the authorities that have been cited, and its peculiarity arises from the admission which was made before the justices for the purposes of the hearing before them. It is not unimportant to observe that it is not a case of evidence having been taken before the justices to prove that an admission had been made. It is a case in which the admission was made before the justices themselves and for the very purpose of the hearing. It was part of the materials on which the justices were asked to give their decision. What then was the effect of the admission? It is plain that it was intended to mean that the tramroad in respect of which the rates in question were made was, if the decision of the Court of Appeal in *Blackpool and Fleetwood Tramway Co.* v. *Thornton Urban Council* (4) was right, land used only as a railway constructed under the powers of an Act of

(1) 10 Q. B. 868.
(2) 55 L. J. (M.C.) 40.
(3) 34 W. R. 355.
(4) [1907] 1 K. B. 568.

Parliament for public conveyance within the meaning of art. 3 of the provisional order of 1882; and the justices were bound, as we are bound, to assume that the decision of the Court of Appeal was right. It is true that the judgment of the Court of Appeal turned upon the construction of s. 211 of the Public Health Act, 1875, and not upon the construction of art. 3 of the provisional order, but the language of the two is substantially the same. Now, that being the admission before the justices, it seems to me that they were not called upon to try any question; they were only asked to take into consideration and apply the law of which they were bound to take notice. Upon every application to justices for a distress warrant they must necessarily take into consideration the law relating to the subject-matter with which they are dealing; and here the justices were only called upon to do that which they must have done if the fact which the appellant admitted had appeared upon the face of the rate-book. In my opinion, where upon the facts admitted by the parties before the justices it appears by mere reference to the law, without making further inquiry, that the rate is bad, the justices have jurisdiction to refuse to issue the distress warrant. I wish to add that I do not think it is sufficient to dispose of this case to say that the objection might have been taken on appeal to quarter sessions, for I think it will be found, in many if not in most of the cases in which it has been held that justices were entitled to refuse to issue the warrant, the objection upon which the justices acted was one which might have been raised by way of appeal to quarter sessions. For these reasons I think the appeal must be dismissed.

Appeal dismissed.

Solicitors for appellant: *Hulberts, Hussey & Metcalfe, for F. W. Wood, Fleetwood.*

Solicitors for respondents: *Nicholson, Graham & Beesly, for J. R. Gaulter, Fleetwood.*

J. F. C.

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March 4.

[IN THE COURT OF APPEAL.]

CUENOD *v.* LESLIE.

Husband and Wife—Fraud by Wife—Tort committed during Coverture—Subsequent Decree of Judicial Separation—Husband's Liability—Married Women's Property Act, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 2—*Matrimonial Causes Act*, 1857 (20 & 21 *Vict. c.* 85), *s.* 26.

The intention and effect of s. 26 of the Matrimonial Causes Act, 1857, is to put the wife for all civil purposes in the same position as if her husband were dead during all the time that the decree of judicial separation is in force, and, therefore, the pronouncement of the decree, after the commencement of an action against a husband and wife for the wife's tort, but before judgment, entitles the husband to be discharged from the action to which he was a party only for the sake of a rule of conformity which no longer applies to the woman who is being sued.

In an action against husband and wife for fraudulent representations by the wife after the marriage whereby the plaintiff sustained damage it appeared that the husband had no knowledge of or connection with the fraud, and that the wife had obtained a decree absolute for judicial separation from him after the commencement of the action, but before judgment:—

Held, that upon the proper construction of s. 26 of the Matrimonial Causes Act, 1857, the husband was entitled to judgment.

Seroka v. *Kattenburg*, (1886) 17 Q. B. D. 177, and *Earle* v. *Kingscote*, [1900] 2 Ch. 585, criticized by Fletcher Moulton L.J.

This was an appeal from a decision of Ridley J., sitting without a jury, which raised the question of the liability of a husband for a tort committed by his wife during the coverture where a decree for judicial separation had been obtained in the course of the action, but before judgment.

The defendants, who were husband and wife, married in 1906. In July, 1906, while staying abroad after their marriage, the wife opened an account with the plaintiffs, bankers at Vevey, Switzerland, and asked them to buy certain securities for her and cash her cheques; she induced them to do this by means of a cheque on a bank in America, which they cashed, but which, when presented to the bank in America, was dishonoured; by fraudulent misrepresentations to the plaintiffs she also obtained

possession of some of these securities and converted them to her own use.

The husband was not a party to these frauds, nor did the wife act as his agent, neither did he derive any benefit from these frauds.

On November 1, 1906, the plaintiffs issued the writ in this action against the husband and wife to recover the balance due on the wife's account with them.

On June 10, 1907, a final decree for judicial separation was obtained by the wife against her husband.

The husband by his defence pleaded the decree for judicial separation since the commencement of the action as a complete answer to the plaintiffs' claim. The wife did not appear to defend the action.

On October 14, 1908, Ridley J. gave judgment against both defendants for 631*l.* 7*s.* 6*d.* and costs. The husband appealed.

Lush, K.C., and *George Wallace*, for the appellant. Upon the true construction of s. 1, sub-s. 2, of the Married Women's Property Act, 1882, the husband, apart from authority, is no longer liable for his wife's torts, inasmuch as the only ground of his liability at common law was that a married woman was incapable of being sued alone, and the Act says that he is no longer a necessary party; but *Seroka* v. *Kattenburg* (1) is opposed to this contention, and that decision has been approved by the Court of Appeal in *Earle* v. *Kingscote*. (2) This point, therefore, is not open to the appellant in this Court.

The sentence of judicial separation puts an end to the husband's liability. The effect of ss. 25 and 26 of the Matrimonial Causes Act, 1857 (3), is to constitute the wife a feme sole from the date of the sentence, so long as the separation

(1) 17 Q. B. D. 177.

(2) [1900] 2 Ch. 585.

(3) The material portion of s. 26 is as follows: "In every case of a judicial separation the wife shall, whilst so separated, be considered as a feme sole for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant."

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continues, with respect to any property she may acquire, and for the purposes of contract and wrongs and injuries, and suing and being sued in any civil proceeding, and to put an end to the husband's liability in respect of any engagement or contract she may have entered into or for any wrongful act or omission by her. The same result arises from a decree of dissolution of marriage from the nature of the decree itself, and in that case the statute contains no provisions similar to those above stated because they are not necessary. The sole ground of the husband's liability for torts committed by the wife during coverture is that the wife cannot be sued alone. The husband is joined for conformity only; if he dies the action goes on against the wife; if the wife dies the action abates. So if there has been a divorce or a judicial separation there is no reason for joining him and there is no cause of action against him: *Capel* v. *Powell* (1); *Wright* v. *Leonard* (2); *In re Beauchamp.* (3) It follows that if sentence of judicial separation is pronounced before judgment is obtained in the action for tort the husband's liability is at an end.

The husband's liability for the wife's torts at common law is limited to torts irrespective of contract. The fraud in this case was committed by the wife in the course of making a contract with the plaintiffs, and on this ground also the husband is not liable: *Wright* v. *Leonard* (2); *Earle* v. *Kingscote.* (4) Although there is no authority on the point, still it seems only reasonable that, inasmuch as the husband at common law was only joined for conformity, if after the Married Women's Property Act, 1882, the married woman commits a fraud in dealing with the separate estate itself, the husband should not be liable to be sued. Ridley J. based his decision on *Midland Ry. Co.* v. *Pye* (5), which has no bearing on the case.

E. Pollock, K.C., and *H. S. Simmons*, for the respondents. In *Wainford* v. *Heyl* (6) Jessel M.R. lays it down that a married woman is not liable for general torts, but her husband is liable. In *Scott* v. *Morley* (7) the law as to the liability of a married

(1) (1864) 17 C. B. (N.S.) 743, 748.
(2) (1861) 11 C. B. (N.S.) 258, 266.
(3) [1904] 1 K. B. 572, 581.
(4) [1900] 2 Ch. 585, 593.
(5) (1861) 10 C. B. (N.S.) 179.
(6) (1875) L. R. 20 Eq. 321, 324.
(7) (1887) 20 Q. B. D. 120, 123.

woman on contract and for tort is fully stated, and from this it appears that the Married Women's Property Act, 1882, does not alter the legal liability of a married woman at all, and does not affect the case of a wrongful act committed by a woman during marriage. The words "need not be joined" in s. 1, sub-s. 2, of the Act of 1882 do not discharge the husband from his old liability: *Seroka* v. *Kattenburg*. (1) In these cases and in *Earle* v. *Kingscote* (2) the general rule of law that a husband is liable for his wife's fraud as well as for other torts committed by her during the coverture is taken as clear and unquestioned. The old common law authorities were founded on the following statement in Bacon's Abridgement, "Baron and Feme" (L): "The husband is by law answerable . . . . for all her [the wife's] torts and trespasses during coverture, in which cases the action must be joint against them both: for if she alone were sued it might be a means of making the husband's property liable, without giving him an opportunity of defending himself": Williams Saunders (ed. 1871), vol. 2, p. 122; *Marsh's Case* (3); *Manby* v. *Scott*. (4) These authorities support the view of the old law as stated in *Wainford* v. *Heyl* (5) and *Earle* v. *Kingscote* (2) and shew that the husband is really liable and is not joined merely for the sake of conformity.

At the time when the writ in this action was issued the husband was clearly a proper party and was liable for this tort of his wife, which had been committed before the decree for judicial separation had been made. Sect. 26 of the Matrimonial Causes Act, 1857, only comes into operation from the date of the decree, and has no retrospective operation: *Midland Ry. Co.* v. *Pye*. (6) There is nothing in s. 25 to free the husband from an accrued liability. A decree for judicial separation cannot be higher in this respect than a decree nisi for divorce, and it has been held that a married woman was still under coverture for the purposes of a defence to an action until the decree was made absolute: *Norman* v. *Villars*. (7) Sect. 26 takes effect only

(1) 17 Q. B. D. 177, 179.
(2) [1900] 2 Ch. 585, 593.
(3) (1590) 1 Leon. 312.
(4) 2 Sm. L. C., 11th ed. pp. 446, 456.
(5) L. R. 20 Eq. 321.
(6) 10 C. B. (N.S.) 179.
(7) (1877) 2 Ex. D. 359.

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from the date of the sentence, and does not alter rights of action which have accrued prior to this date. The words of s. 26 are "whilst so separated," which shews that no relation back was intended.

Capel v. *Powell* (1) was not a case of judicial separation, and does not determine the meaning of ss. 25 and 26 of the Act of 1857. *Ramsden* v. *Brearley* (2) was a case under s. 21. The claim is not based upon contract, neither is it a case of fraud inducing a contract. On the facts it is clear that this was a fraud by the wife on the bank; the plaintiffs claim in detinue for conversion and fraud, and they are entitled to damages against the husband for this conversion: *Roberts* v. *Wyatt*. (3)

Wallace, in reply. The decree for judicial separation, which took place after action brought, was a good defence on the husband's part, and could be pleaded under Order XXIV., r. 1. This defence was pleaded, and might have been confessed under r. 3 and so have saved expense.

Cur. adv. vult.

March 4. COZENS-HARDY M.R. This appeal raises the question of the liability of a husband in respect of a tort committed by his wife during the coverture where a decree for judicial separation has been obtained in the course of the action and before judgment. The plaintiffs are foreign bankers, who had dealings in Switzerland with Mrs. Leslie, a woman who was possessed of separate estate. She opened an account with the plaintiffs by means of an American cheque. They purchased for her certain bearer bonds, and she subsequently, by false pretences, and fraudulently, obtained the possession of the bonds and converted them. Now it is admitted that the husband would not be liable in the circumstances of this case if the plaintiffs' claim is based upon contract, as distinct from tort, and I assume in favour of the plaintiffs that the tort in the present case was not so connected with the contract as to prevent the plaintiffs from treating it as a pure tort. The action was commenced on November 1, 1906, and on June 10, 1907, a final decree of

(1) 17 C. B. (N.S.) 743. (2) (1875) L. R. 10 Q. B. 147.
(3) (1810) 2 Taunt. 268.

judicial separation was pronounced in the Divorce Court in England. Ridley J. has given judgment for the plaintiffs against the husband, who has presented the present appeal.

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Cozens-Hardy M.R.

It has been decided in this Court in *Earle* v. *Kingscote* (1), following a decision of a Divisional Court in *Seroka* v. *Kattenburg* (2), that the Married Women's Property Act, 1882, has not altered the law as to the husband's liability. This decision is binding upon us, and I shall therefore treat the case in the same way as it would have been treated in the year 1880. It is often said that a husband is liable at common law for his wife's torts committed during coverture. This language is sometimes used as though it implied a personal liability on the husband to the fullest extent. I think the true proposition is that at common law the husband and wife were liable to be sued jointly and to satisfy the judgment obtained in the action. If, however, the wife dies before judgment, the husband is not liable. In the language of Erle C.J., "marriage does not give a cause of action against the husband. Whilst the husband lives and the relation continues he must be joined in all actions for his wife's debts and trespasses. If the husband dies, the action goes on against the wife. If the wife dies, the action abates, because the husband is not liable": *Capel* v. *Powell.* (3) The husband, in truth, was only joined for the sake of conformity, and not with the view of asserting any individual right against him. It has even been held that, notwithstanding a finding by the jury that the wife only was guilty and not the husband, judgment must nevertheless be entered for the plaintiffs.

It remains to consider the effect of a decree of judicial separation, and this depends upon s. 26 of the Matrimonial Causes Act, 1857. That section enacts not merely that the wife "in the case of a judicial separation shall be considered a feme sole for the purpose of contract and wrongs and injuries and suing and being sued in any civil proceeding," but also that "her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff

(1) [1900] 2 Ch. 585. (2) 17 Q. B. D. 177.
(3) 17 C. B. (N.S.) 743.

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or defendant." In my opinion that section precisely meets the present case, and is a distinct provision that the husband, who was not liable until judgment, but who might have been made liable by continuing the action to judgment, was no longer to be liable, and on that short ground the appeal must be allowed and judgment entered for the defendant husband.

FLETCHER MOULTON L.J. The facts in this case, so far as they are material for our judgment, are as follows. The appellant was the husband of Mrs. Josephine Leslie, the co-defendant in the action. During coverture the wife was guilty of a tort against the plaintiffs, which is the subject-matter of the present action. For the purposes of my decision it is not necessary to consider whether it was a pure tort or whether the tort induced a contract, and therefore the action is really in contract, in which case it is clear that the appellant would not be liable for it. I will assume in favour of the respondents that the action is one of pure tort. During the pendency of the action, and before defence was put in, the wife obtained a decree of judicial separation against her husband. This was duly pleaded by the husband as an answer to the plaintiffs' claim. At the trial it was proved or admitted that the husband had no knowledge of or connection with the frauds of the wife. It was contended on his behalf that he was not liable in respect of them, first, by reason of the provisions of s. 1, sub-s. 2, of the Married Women's Property Act, 1882, and, secondly, by reason of the provisions of s. 26 of the Matrimonial Causes Act, 1857. The learned judge decided against him on both points and gave judgment for the plaintiffs. From this judgment the present appeal is brought.

Counsel for the appellant admits that so far as this Court is concerned there is binding authority against him on the first point. But he raises it, as he is entitled to do, in order if necessary to take the opinion of the House of Lords upon it, and as the point is one of great importance I think it best to examine the whole question of the present position of a husband as regards torts committed by his wife so far as it is raised by these contentions on behalf of the appellant.

The position of a husband prior to 1857 with regard to torts

committed by his wife, either before or during coverture, was very peculiar. Strictly speaking he was not liable for them in any way, but, inasmuch as during coverture the wife could not be sued without her husband, it was necessary to join him "for conformity," as it was termed, and if judgment was obtained while the action was in this state it was a personal judgment against both, entailing the usual consequences. But the reason of the presence of the husband in the action and the nature of his position therein were recognized and continued effective down to judgment. If the wife died before judgment the action abated. If the husband died before judgment the action continued against the wife, and whatever the nature of the tort the husband's representatives were not liable and could not be joined. The Courts acted consistently on the principle that the husband was a defendant only because he must be made so by reason of the rule of law that the wife could not be sued alone. This is laid down with the utmost clearness in a judgment of Erle C.J. in *Capel* v. *Powell* (1), and the law as there stated has so far as I know never been questioned and is in accordance with all the authorities.

But, although in a strictly legal sense a husband was not liable for torts committed by a wife, it is evident that practically a liability for such torts could be imposed upon him by obtaining judgment in an action brought against the wife in which he must be joined for conformity. This mode of imposing a liability upon him could only be defeated by the death of one of the parties or a dissolution of the marriage before judgment, so that in practice a husband could in the great majority of cases be made to bear the consequences of a wife's torts. It became, therefore, customary to speak of a husband as being liable for his wife's torts, but this phrase, though convenient and frequently to be found in reports of cases, was never used in any sense inconsistent with that to which I have referred, and its use does not in any way imply that at any time our Courts considered that there was any personal liability in the husband until after judgment.

The legal position of a husband towards a wife in civil matters relating to property and liability was, however, greatly modified by the Married Women's Property Acts, which are now represented,

(1) 17 C. B. (N.S.) 743.

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so far as the questions in the present case are concerned, by the Married Women's Property Act, 1882. By s. 1, sub-s. 2, of that Act it is provided as follows: "A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her . . . ."

My own personal view is that this language is very carefully chosen. The draftsman was perfectly aware of the status of a husband in respect of a wife's torts. He knew that the Courts had permitted him to be joined in an action brought upon a cause of action with regard to which he had no personal liability only because they were obliged to do so, since the wife could not be sued alone. He might be joined only because he must be. The draftsman therefore felt that the correct mode of putting an end to the anomaly was to remove the necessity which alone had led to it. If this necessity for the presence of the husband no longer existed, why should the Courts permit a man to be made defendant in an action in respect of matters for which he was not liable, and where his presence was not required? That this was intended to be the meaning and effect of the section appears to me to be clear also from the provision that "any damages or costs recovered against her in any such action or proceeding"—i.e., an action or proceeding taken against her—"shall be payable out of her separate property, and not otherwise." This makes it clear that the husband's property is no longer to be a source from which the damages or costs of an action of tort against the wife are to be satisfied.

If I am right as to this being the construction of the subsection, it would appear that the strict accuracy of the language used has defeated its object. The use of the word "may," and not "must," has the appearance of leaving it optional, and in the case of *Seroka* v. *Kattenburg* (1) a Divisional Court, and subsequently in the case of *Earle* v. *Kingscote* (2) this Court, has held

(1) 17 Q. B. D. 177. (2) [1900] 2 Ch. 585.

that it is still open to a plaintiff to join the husband as defendant in an action for a tort committed by the wife. This decision is of course binding upon us, but in my opinion it is most desirable that the matter should be reviewed by the final Court of Appeal, because the present state of things is highly anomalous. I cannot believe that the Married Women's Property Act, 1882, which drew such a clear line of separation between the husband's and wife's property and liabilities, and arranged them in other respects so fairly on the lines of separate personal responsibility, could have intended to leave such a blot on the legislation as would follow from permitting a plaintiff to recover damages from a husband in respect of torts of the wife either before or during coverture, although he was not liable for the torts or any participation in them, and was not needed as a party to the action.

I come now to the second point. By s. 26 of the Matrimonial Causes Act, 1857, it is provided as follows: "In every case of a judicial separation the wife shall, whilst so separated, be considered as a feme sole for the purposes of contract, and wrongs and injuries, and suing and being sued in any civil proceeding: and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant." Although in my opinion this language is not so strictly accurate from a legal point of view as that used in the Married Women's Property Act, 1882, s. 1, sub-s. 2, it has the advantage of leaving no doubt possible as to the meaning of the Legislature, and it is admitted that where there is a judicial separation the wife must be sued alone, and that the husband cannot be joined and has no liability for her torts. But it is contended on behalf of the plaintiffs that this does not apply to wrongs committed by the wife during coverture and before the decree of judicial separation. The learned judge in the Court below has taken this view. I cannot agree with it. The wife who has obtained a decree for judicial separation is to be taken as a feme sole for the purpose of "suing and being sued." Suppose, then, that a wife who is judicially separated from her husband is sued for a tort committed during coverture.

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She can appear alone, for she is a feme sole, and as a feme sole she cannot be considered as having a husband who should, or indeed can, be added for conformity. And there is no personal liability in the husband himself which could justify his being added in his own right as defendant. It is therefore quite clear to my mind that the fact that the tort was committed during coverture would not make the husband liable to be joined in an action brought upon that tort after the decree had been pronounced. In the present case there is no doubt an added complication in that the writ was issued before the decree. But the difficulty so introduced is one only in appearance, and not in reality. So soon as the decree is pronounced she is to be treated as a feme sole, and therefore as having no husband, and the husband is no longer a proper party to the action, for his presence is no longer a compliance with the rule of conformity any more than the presence of a stranger would be. He is therefore entitled to be struck out, or to have judgment given for him, as would any other stranger to the cause of action. The learned judge appears to have been influenced by the decision of the Court in *Midland Ry. Co.* v. *Pye.* (1) I cannot see the relevancy of that decision to the point in controversy in this case. The Court there held that a plaintiff who has no cause of action when the writ is issued cannot succeed in the action by reason of his subsequently acquiring one. This is elementary law. But the position of a defendant is not analogous to that of a plaintiff in this respect. Pleading defences arising during action is every-day practice, and, save and except as to costs down to the date of pleading, a defence so arising is just as effective as if it had arisen before action. In my opinion the intention and effect of s. 26 of the Matrimonial Causes Act, 1857, is to put the wife for all civil purposes in the same position as if her husband were dead during all the time that the decree of judicial separation is in force, and therefore the pronouncement of the decree entitles the husband to be discharged from the action to which he was a party only for the sake of a rule of conformity which no longer applies to the woman who is being sued.

(1) 10 C. B. (N.S.) 179.

For these reasons I am of opinion that this appeal must be allowed with costs, and the action, so far as the husband is concerned, dismissed with costs.

BUCKLEY L.J. In July, 1906, the wife, Mrs. Leslie, committed a fraud, and for the purposes of my judgment I assume in favour of the plaintiffs that her tort was not so connected with contract as that the plaintiffs cannot treat it as a pure tort. In November, 1906, the writ in this action was issued. In June, 1907, the wife obtained against her husband a decree of judicial separation. The question is whether in this state of facts the husband can be rendered liable for the wife's tort committed during the coverture.

Upon the question raised upon s. 1, sub-s. 2, of the Married Women's Property Act, 1882, I express no opinion. The decision in *Seroka* v. *Kattenburg* (1) and *Earle* v. *Kingscote* (2) is binding upon me, and it is not within my province to criticize it. Mr. Lush has taken the proper steps to keep that question open for discussion in the House of Lords. For the purpose of this judgment I treat myself as bound by the decision that the Act of 1882 leaves the husband as liable as he was before that Act for his wife's tort committed during the coverture.

But, making this the starting point, it seems to me that the plaintiffs cannot succeed unless they can maintain the legal proposition that an action for the wife's tort did not abate upon the wife's death, but continued against the husband. So to hold would be, I think, directly contrary to *Capel* v. *Powell* (3), a decision which, in my opinion, is perfectly good law. The 26th section of the Matrimonial Causes Act, 1857, by providing that in the case of a judicial separation the wife shall while separated be considered as a feme sole for the purpose of wrongs and being sued in a civil proceeding, and that her husband shall not be liable for any wrongful act by her, extends, I think, to the case of the wife's tort committed during coverture and expressly relieves her husband from liability. Upon that ground, and apart from the

(1) 17 Q. B. D. 177. (2) [1900] 2 Ch. 585.
(3) 17 C. B. (N.S.) 743.

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Act of 1882, the appeal succeeds, and judgment should be entered for the defendant husband.

Appeal allowed.

Solicitors: *E. F. Turner & Sons; Slaughter & May.*

W. C. D.

1909 *Feb.* 2.

[COURT OF CRIMINAL APPEAL.]

THE KING *v.* DAVIES.

Criminal Law—Probation of Offenders—Conviction for Offence not involving Drunkenness — Release on Probation — Recognizance — Condition as to Abstention from Intoxicating Liquor—Probation of Offenders Act, 1907 (7 *Edw.* 7, *c.* 17), *s.* 1, *sub-s.* 2; *s.* 2, *sub-s.* 2 (*b*).

When a prisoner has been convicted on indictment of an offence punishable with imprisonment but which was in no way connected with indulgence in drink, and the Court in lieu of imposing a sentence of imprisonment makes an order under s. 1, sub-s. 2, of the Probation of Offenders Act, 1907, discharging the offender conditionally on his entering into a recognizance to be of good behaviour and to appear for sentence when called on at any time during a period not exceeding three years, the Court has no power to order an additional condition as to abstention from intoxicating liquor to be inserted in the recognizance, inasmuch as s. 2, sub-s. 2 (*b*), of the Act of 1907 only authorizes the condition to be inserted in the recognizance where the offence of which the prisoner was convicted was drunkenness or an offence committed under the influence of drink. Therefore a sentence inflicted for breach of the condition is liable to be quashed.

APPEAL by the prisoner, Moses Davies, against his sentence by leave of the Court of Criminal Appeal given under s. 3, sub-s. (*c*), of the Criminal Appeal Act, 1907.

The prisoner was indicted at the Ruthin quarter sessions for housebreaking and larceny in a dwelling-house, and was convicted of larceny in the dwelling-house.

The Court of quarter sessions by its sentence ordered him under s. 1, sub-s. 2, of the Probation of Offenders Act, 1907 (1),

(1) Probation of Offenders Act, 1907, s. 1, sub-s. 2: "Where any person has been convicted on indictment of any offence punishable with imprisonment, and the court is of opinion that, having regard to the

to be discharged from custody on his entering into a recognizance in the sum of 5*l.* to be of good behaviour and to appear for sentence when called upon at any time during the period of two years. The Court further ordered the recognizance to contain the following additional conditions:—(*a*) For prohibiting the prisoner from associating with thieves and other undesirable persons or from frequenting undesirable places; (*b*) for abstaining from intoxicating liquors; (*c*) generally for securing that the prisoner should lead an honest and industrious life.

The actual terms of the recognizance were not before the Court of Criminal Appeal, but, for the purposes of the appeal, that Court assumed that the recognizance, in accordance with the order of quarter sessions, indicated in an intelligible form to the prisoner the conditions he was required to observe.

A year after his conviction the prisoner was sentenced, under s. 6 of the Probation of Offenders Act, 1907, by the Court of quarter sessions to twelve months' imprisonment for having broken his recognizance, the substantial allegation against him (which the Court found was established by the evidence) being

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character, antecedents, age, health, or mental condition of the person charged, or to the trivial nature of the offence, or to the extenuating circumstances under which the offence was committed, it is inexpedient to inflict any punishment or any other than a nominal punishment, or that it is expedient to release the offender on probation, the court may, in lieu of imposing a sentence of imprisonment, make an order discharging the offender conditionally on his entering into a recognizance, with or without sureties, to be of good behaviour and to appear for sentence when called on at any time during such period, not exceeding three years, as may be specified in the order."

Sect. 2, sub-s. 2: "A recognizance under this Act may contain such additional conditions as the court may, having regard to the particular circumstances of the case, order to be inserted therein with respect to all or any of the following matters:—

(*a*) for prohibiting the offender from associating with thieves and other undesirable persons, or from frequenting undesirable places;

(*b*) as to abstention from intoxicating liquor, where the offence was drunkenness or an offence committed under the influence of drink;

(*c*) generally for securing that the offender should lead an honest and industrious life."

Sub-s. 3: "The court by which a probation order is made shall furnish to the offender a notice in writing stating in simple terms the conditions he is required to observe."

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that he had been seen under the influence of drink and had been frequenting public-houses.

The prisoner appealed on the ground (inter alia) that the Court of quarter sessions had no power to order the condition as to abstention from intoxicating liquors to be inserted in the recognizance.

Artemus Jones, for the prisoner. There was no power to insert the condition (*b*) in the recognizance. The Probation of Offenders Act, 1907, s. 2, sub-s. 2 (*b*), under which the Court of quarter sessions inserted the condition, does not apply. It only gives power to insert a condition as to abstaining from intoxicating liquor "where the offence was drunkenness or an offence committed under the influence of drink." The recognizance is therefore void. No evidence as to breach of condition (*b*) was admissible in law. The sentence for breaking it ought therefore to be quashed.

R. M. Montgomery, for the prosecution. The point was not raised before the Court of quarter sessions. That Court desires to leave the matter in the hands of this Court and to have its judgment.

The judgment of the COURT (Lord Alverstone C.J., Channell and Walton JJ.) was delivered by

LORD ALVERSTONE C.J. Sect. 2, sub-s. 2 (*b*), of the Probation of Offenders Act, 1907, allows the condition as to abstention from intoxicating liquor to be inserted in a recognizance only when the original offence was drunkenness or was committed under the influence of drink, and as it appears that the original conviction in this case had nothing to do with drunkenness, or with anything connected with drunkenness, it seems to us that the condition in the recognizance as to abstention from intoxicating liquors was improperly inserted. We do not decide that the whole recognizance is bad, nor express any opinion as to what the effect would have been if there had been evidence of breach of the other conditions contained in the recognizance. As to that the Court expresses no opinion. Although the Court of quarter sessions has found as a fact that the prisoner has forfeited his recognizance,

the substantial question before them was the prisoner's connection with drink. The Court considers, therefore, that the prisoner has been sentenced for the breach of a condition which has been improperly imposed, and the Court of quarter sessions was not justified in treating the recognizance as forfeited. The prisoner must remember that he may still be liable if he breaks the other conditions imposed by associating with undesirable persons or by not leading an honest and industrious life.

Sentence quashed.

Solicitor for prosecution: *The Director of Public Prosecutions.*

Solicitor for prisoner: *The Registrar of the Court of Criminal Appeal.*

J. E. A.

[COURT OF CRIMINAL APPEAL.]

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Feb. 23.

THE KING *v.* MEADE.

Criminal Law—Murder—Drunkenness—Manslaughter—Prisoner so affected by Drink as to be incapable of knowing that his Act is dangerous—Direction to Jury.

Upon the trial of an indictment for murder the question whether the jury are justified in returning a verdict of manslaughter on the ground of the voluntary drunkenness of the prisoner may be determined by the following rule:—

A man is taken to intend the natural consequences of his acts. This presumption may be rebutted, in the case of a man who is drunk, by shewing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, i.e., likely to inflict serious injury. If this be proved, the presumption that he intends to do grievous bodily harm is rebutted.

Upon the trial of a prisoner for murder evidence was given that he was drunk at the time of the commission of the act charged, and the judge gave the following direction to the jury:—

"In the first place, every one is presumed to know the consequences of his acts. If he be insane, that knowledge is not presumed. Insanity is not pleaded here, but where it is part of the essence of a crime that a motive, a particular motive, shall exist in the mind of the man who does the act, the law declares this—that if the mind at that

time is so obscure by drink, if the reason is dethroned and the man is incapable therefore of forming that intent, it justifies the reduction of the charge from murder to manslaughter."

Held, that the direction was right.

R. v. MEADE.

APPEAL by the prisoner against his conviction on grounds involving questions of law.

The prisoner was tried at the Leeds winter assizes before Lord Coleridge J. and a jury for the murder of Clara Howell.

At the trial it was proved that the prisoner brutally ill-treated the deceased woman during a great part of the night on which she died, he said that he would give her a good hiding, and he broke a broomstick over her. He struck her a blow on the top of the nose, and, as she fell towards him, gave her a violent blow with his fist on the lower part of the body, which ruptured an intestine, and she died during the night.

Evidence was called on behalf of the prisoner to shew that at the time he caused the death of Clara Howell he was drunk, the defence being that the prisoner did not intend to cause the death of, or grievous bodily harm to, the dead woman, and that the jury in deciding that question ought to take into consideration the fact that he was drunk, and would, on the facts, be justified in returning a verdict of manslaughter.

In the course of his summing up to the jury Lord Coleridge J. said: "In the first place, every one is presumed to know the consequences of his acts. If he be insane, that knowledge is not presumed. Insanity is not pleaded here, but where it is part of the essence of a crime that a motive, a particular motive, shall exist in the mind of the man who does the act, the law declares this—that if the mind at that time is so obscure by drink, if the reason is dethroned and the man is incapable therefore of forming that intent, it justifies the reduction of the charge from murder to manslaughter."

The jury returned a verdict of guilty of murder.

The prisoner appealed from his conviction on the ground that the direction of Lord Coleridge J. to the jury in his summing up would lead them to suppose that they must either find that the prisoner was guilty of murder, or (in order to justify them in bringing in a verdict of manslaughter) that he was incapable of

forming the intent to cause the death of, or grievous bodily harm to, the dead woman, because they must find that he was insane or in a state resembling insanity at the time, the proper alternatives to be left to them being, it was contended, murder or absence of intention in fact, and therefore manslaughter.

J. Willoughby Jardine, for the prisoner. Lord Coleridge J. in his summing up misdirected the jury. The words used by him would naturally convey to the jury the meaning that in order to acquit the prisoner of murder it was necessary for them to find that he was mad through drunkenness at the time he committed the crime. The question ought to have been left to the jury whether the prisoner in fact had no intention of doing grievous bodily harm, as well as whether he was incapable of forming the intention: *Reg.* v. *Doody.* (1) *Rex* v. *Carroll* (2) is not in point. It involved the question of the effect of provocation. *Rex* v. *Meakin* (3) is in the prisoner's favour. *Rex* v. *Grindley* (4) was disapproved of by Park J. in *Rex* v. *Carroll.* (2) In *Reg.* v. *Monkhouse* (5), *Reg.* v. *Doherty* (6), and *Rex* v. *Carroll* (2) the instrument which was the cause of death was a deadly weapon.

Bruce Williamson, for the prosecution. A person is presumed in law to intend the consequences of his act. Unless the jury could draw the inference upon the evidence that the prisoner was incapable of having the intention, the inference of law that he had the intention applies: *Reg.* v. *Doherty.* (6) Where drunkenness is relied on as a defence to a charge of murder, the jury cannot come to the conclusion that the prisoner did not intend to cause the death unless they first come to the conclusion that he was so drunk as to be incapable of having the intention: *Reg.* v. *Monkhouse.* (5)

The judgment of the COURT (Darling, Walton, and Pickford JJ.) was delivered by

DARLING J. In this case the question to be decided arises out of certain words used by Lord Coleridge J. in summing up to the

(1) (1854) 6 Cox, C. C. 463.
(2) (1835) 7 C. & P. 145.
(3) (1836) 7 C. & P. 297.
(4) (1819) 1 Russ. on Crimes (6th ed.) 144.
(5) (1849) 4 Cox, C. C. 55.
(6) (1887) 16 Cox, C. C. 306.

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jury. Complaint is made as to certain words used by him in leaving to the jury considerations applicable to the case of a man who, being drunk at the time, has done acts which result in the death of another, with whose murder he is charged. I will deal with these words presently; but it is necessary before doing so to deal with the history of the doctrine of the effect of drunkenness upon a charge of a crime, such as murder, where the question of intent is involved. Originally the law was that although an insane person was not liable to the same consequences and ought not to be judged by the same standard as a sane one, yet, if he was suffering from dementia affectata, that is, a temporary insanity caused by the accused's own voluntary act in getting drunk, then drunkenness was no excuse for crime: 1 Hawkins' Pleas of the Crown, c. 1, s. 6, where it is said, "And he who is guilty of any crime whatever through his voluntary drunkenness, shall be punished for it as much as if heen had be sober." The law stood as thus expressed for many years, and, as far as we know, the point was first decided in a contrary sense in *Rex* v. *Grindley* (1), decided in the year 1819. Since then there have been many decisions in which judges have attempted to express the doctrine that where intent is of the essence of a crime with which a person is charged, that intent may be disproved by shewing that at the time of the commission of the act charged the prisoner was in a state of drunkenness, in which state he was incapable of forming the intent. Different judges have expressed themselves differently, but not so differently as to be irreconcilable and to prevent the Court from saying that they were expressing the same doctrine. The two authorities which bear most upon the point are *Reg.* v. *Monkhouse* (2) and *Reg.* v. *Doherty* (3), the first decided by Coleridge J. and the second by Stephen J., and no doubt identical expressions were not used in each. But it is necessary to repeat what has often been said before in this Court, namely, that when a judge sums up to a jury he must not be taken to be inditing a treatise on the law. He addresses himself to the particular facts of the case then before the jury, and no judge can affect, in those circumstances, to give

(1) 1 Russ. on Crimes (6th ed.) 144. (2) 4 Cox, C. C. 55.
(3) 16 Cox, C. C. 306.

an exhaustive definition, or one which applies to every conceivable case. It is enough if he gives a sufficient definition, and rightly directs the attention of the jury to the facts of the case before them. That is true of the present case. I have stated what the ancient view was, and that it is not now in accordance with the law. We do not consider it any part of our duty to enlarge the rule of law or to use language wider than that used by the judges who have considered the question before, for it is not our duty to say anything which will confer an immunity greater than that which they already enjoy on persons who have voluntarily made themselves drunk. On behalf of the prisoner it was said that the words used by Lord Coleridge J. would induce the jury to suppose that unless they found the appellant insane they would not be justified in finding him guilty of manslaughter. But he had expressly told the jury that there was no plea of insanity. That was sufficient to warn the jury not to make such a mistake. The appellant brutally ill-treated the deceased woman during a great part of the night on which she died, he said that he would give her a good hiding, and he broke a broomstick over her. He struck her a blow on the top of the nose, and, as she fell towards him, gave her a violent blow with his fist on the lower part of the body, which ruptured an intestine, and she died during the night. If he did do this and she died of the injury, and he intended to inflict serious bodily injury on her, he was guilty of murder. It was contended at the trial that the presumption that the prisoner had this intent was rebutted because he, by reason of drunkenness, had no such intent. It then became the duty of Lord Coleridge J. to lay down the rule as to the nature of the drunkenness which would be sufficient to satisfy them that the prisoner had not that intent. We desire to state the rule in the following terms: A man is taken to intend the natural consequences of his acts. This presumption may be rebutted—(1.) in the case of a sober man, in many ways: (2.) it may also be rebutted in the case of a man who is drunk, by shewing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, i.e., likely to inflict serious injury. If this be

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proved, the presumption that he intended to do grievous bodily harm is rebutted.

In our opinion this doctrine was not expressed by Lord Coleridge J. in such a way as to mislead the jury into thinking that insanity must be proved. We have carefully considered the words used by him. We have been unable to trace some of them to the language used previously by judges. But a judge is not condemned to use no words which are not commonplace. It is said that some of the language used by Lord Coleridge J. is picturesque and figurative. No doubt; but it is quite easy to say in picturesque and figurative language that which is true. We cannot say that the language used by Lord Coleridge J. differs in its meaning from the rule we have just laid down. It is unnecessary to criticize the very words used. Unless we think them misleading and calculated to lead the jury to think that something equivalent to absolute insanity must be proved to entitle them to bring in a verdict of manslaughter, this appeal ought to be dismissed. After having carefully considered the authorities and the language used by Lord Coleridge J., we have come to the conclusion that there is nothing in the words used by him which is contrary to the rule we have laid down or to former decisions, and that the appeal ought therefore to be dismissed.

Appeal dismissed.

Solicitor for prosecution: *W. T. Ward, Leeds.*

Solicitor for prisoner: *The Registrar of the Court of Criminal Appeal.*

J. E. A.

[IN THE KING'S BENCH DIVISION AND IN THE COURT OF APPEAL.]

K. B. D. 1908 *July* 4, 14. C. A. 1909 *Feb.* 3, 4; *March* 1.

GOZNEY *v.* BRISTOL, &c. TRADE AND PROVIDENT SOCIETY.

Trade Union—Restraint of Trade—Action by Member against Society—Illegality—Strike Pay—Declaratory Judgment—Trade Union Act, 1871 (34 & 35 *Vict. c.* 31), *s.* 4—*Trade Union Act* (1871) *Amendment Act*, 1876 (39 & 40 *Vict. c.* 22), *s.* 16.

The plaintiff, being a member of and in receipt of sick pay from the defendant society, was subjected to a deduction of 2*s.* 6*d.* from his sick pay for breach of the rules of the society. He thereupon brought an action in the county court for a declaration to the effect that he had not broken the rules and for the return of the 2*s.* 6*d.* as having been improperly deducted. It appeared that the defendant society was registered under the Trade Union Acts of 1871 and 1876 as a trade union, and that its rules provided for raising funds to secure to the members the benefits of a superannuation fund, a sick fund, a funeral fund, a travelling fund, and a trade fund. Rule 1 stated that the society was "a trade union." By rule 7, clause 2, section 4, "Should work be offered at the current rate of wages to any member receiving travelling relief, unless it be to fill the place of those fighting for better conditions, and he refuses to accept it, his allowance shall be at once stopped, and his card given up."

By rule 40, section 1, members paying to the trade fund were to be entitled to dispute pay, travelling relief, and assistance to sue employers under the Employers' Liability and Workmen's Compensation Acts. Section 2 was as follows: "Strike pay will only be paid in support of members endeavouring to secure an advance of wages or resisting a reduction of same, resisting an increase of the hours of labour, and, when desirable, endeavouring to secure a reduction of same." By section 4, "Should a strike take place, all members who are entitled to trade benefit under this rule shall receive pay at the rate of 1*s.* 8*d.* per day for each working day, not to exceed six weeks. If the strike continue, the executive committee shall be empowered to continue pay for a longer period, if they, upon consideration, deem it necessary. . . . ."

By section 6, "No officer or member of this society shall be authorized or permitted to take any active interest in, aid in any way, or otherwise assist any trade movement except in his private capacity. . . . ."

The judge held that the society was a trade union, that its objects were in restraint of trade and illegal at common law, and that therefore he was precluded by s. 4 of the Trade Union Act, 1871, from entertaining the claim:—

Held, reversing the judgment of a Divisional Court (Channell and

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Sutton JJ.), which had affirmed the decision of the county court judge, that there was jurisdiction to entertain the claim, for the objects of the society were not illegal, and the rules amounted to no more than an insurance of the members against the consequences of a strike.

APPEAL from the Aberdare County Court.

The plaintiff, Alfred Gozney, was a member of and in receipt of sick pay from the Bristol, West of England, and South Wales Operatives' Trade and Provident Society, and he was fined 2*s.* 6*d.* for being out after 6 o'clock in the evening in breach of the rules of the society. He brought an action in the Aberdare County Court for a declaration as to the construction of some of the society's rules which referred to penalties imposed on sick members for being out after hours; for a declaration that the plaintiff was right in carrying out the directions of his doctor, and that the defendants were wrong in fining him for so doing; and for the return of the 2*s.* 6*d.*

The learned county court judge held that he had no jurisdiction to deal with the subject-matter of the plaintiff's claim on the ground that the society was a trade union, and that he was precluded by s. 4 of the Trade Union Act, 1871, from trying the case.

The plaintiff appealed.

The defendant society was registered under the Trade Union Acts of 1871 and 1876 (1), as a trade union, and its rules provided

(1) Trade Union Act, 1871 (34 & 35 Vict. c. 31), s. 4: "Nothing in this Act shall enable any Court to entertain any legal proceeding instituted with the object of directly enforcing or recovering damages for the breach of any of the following agreements, namely,

"1. Any agreement between members of a trade union as such, concerning the conditions on which any members for the time being of such trade union shall or shall not sell their goods, transact business, employ, or be employed.

"2. Any agreement for the payment by any person of any subscription or penalty to a trade union.

"3. Any agreement for the application of the funds of a trade union,—

"(*a*) To provide benefits to members; or

"(*b*) To furnish contributions to any employer or workman not a member of such trade union, in consideration of such employer or workman acting in conformity with the rules or resolutions of such trade union; or

"(*c*) To discharge any fine imposed upon any person by

for the raising by entrance fees and subscriptions, &c., of funds to secure to the members the benefits of a superannuation fund, a sick fund, payments to seamen on foreign stations and members leaving the United Kingdom, a funeral fund, a travelling fund, assistance in recovering compensation for injuries, and a trade fund. An executive committee was to be elected and a general council appointed. Amongst the rules were the following :—

Rule 1. "This society is a trade union . . . . "

Rule 2. "The objects of the society shall be to raise by entrance fees, weekly contributions, fines, and levies, such funds as provide for the following benefits :—

"1. Trade benefit to existing members, as per rule 40.

"2. Payment of sum in sickness or accident, as per rule 5.

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sentence of a court of justice; or

"4. Any agreement made between one trade union and another; or

"5. Any bond to secure the performance of any of the above mentioned agreements.

"But nothing in this section shall be deemed to constitute any of the above mentioned agreements unlawful."

Sect. 23: "The term 'trade union' means such combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, as would, if this Act had not passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade. Provided that this Act shall not affect—

"1. Any agreement between partners as to their own business;

"2. Any agreement between an employer and those employed by him as to such employment;

"3. Any agreement in consideration of the sale of the goodwill of a business or of instruction in any profession, trade, or handicraft."

Trade Union Act (1871) Amendment Act, 1876 (39 & 40 Vict. c. 22), s. 16: "So much of section twenty-three of the principal Act" (i.e., the Trade Union Act, 1871) "as defines the term trade union, except the proviso qualifying such definition, is hereby repealed, and in lieu thereof be it enacted as follows: The term 'trade union' means any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the principal Act had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade."

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"3. Payment of sum of money on the death of a member, or member's wife, or widow, as per rules 4 and 6.

"4. Payment of superannuation, as per rule 4.

"5. Payment of travelling relief, as per rule 7.

"6. To supply when requisite surgical appliances to members, as per rule 35.

"7. To secure to all the protection and benefits of the Employers' Liability and Workmen's Compensation Acts, as per rule 20.

"8. To regulate the relations between employers and workmen."

Rule 7, clause 2, section 4. "Should work be offered at the current rate of wages to any member receiving travelling relief, unless it be to fill the place of those fighting for better conditions, and he refuses to accept it, his allowance shall be at once stopped, and his card given up."

Rule 40, section 1. "Trade members paying to this fund at the time these rules come into force, whether paying 3*d.* per week to this fund only, or 2*d.* per week to trade, in addition to their contributions for sickness and death benefits, shall be entitled to the following benefits:—Dispute pay, travelling relief, and assistance to sue employers for compensation under the Employers' Liability and Workmen's Compensation Acts."

Section 2. "Strike pay will only be paid in support of members endeavouring to secure an advance of wages or resisting a reduction of same, resisting an increase of the hours of labour, and, when desirable, endeavouring to secure a reduction of same."

Section 3. "When a dispute exists in any occupation for any of the foregoing objects in which members are concerned, notice shall at once be given to the lodge secretary. The executive committee shall at once be notified and all particulars supplied."

Section 4. "Should a strike take place, all members who are entitled to trade benefit under this rule shall receive pay at the rate of 1*s.* 8*d.* per day for each working day, not to exceed six weeks. If the strike continue, the executive committee shall be empowered to continue pay for a longer period, if they, upon consideration, deem it necessary. No members shall be entitled to strike pay when receiving sick pay from this or any other society."

Section 5. "Any member who is over eight weeks in arrears with his contributions shall not be entitled to benefit until the expiration of seven days after clearing up all he owes. Should his arrears exceed sixteen weeks, he shall be excluded and not allowed to pay up."

Section 6. "No officer or member of this society shall be authorized or permitted to take any active interest in, aid in any way, or otherwise assist any trade movement except in his private capacity. The society's liability shall be held to be ended when the person entitled to dispute pay by this rule has received his pay."

J. A. Compston, for the plaintiff.

J. A. Simon, K.C., and *T. B. Napier*, for the defendants.

Cur. adv. vult.

1908. July 14. CHANNELL J. read the following judgment:— This is an appeal from the decision of Judge Bryn Roberts at the Aberdare County Court. He held that he had no jurisdiction to entertain the plaintiff's claim on the ground that the defendants were a trade union, and that the claim was withdrawn from his jurisdiction by s. 4 of the Trade Union Act, 1871. The defendants had given notice pursuant to the County Court Rules of a statutory defence and had named that section as the statute on which they relied. The defendant society is, in fact, registered under the Acts of 1871 and 1876 as a trade union, and there was some discussion when the case was argued before us as to whether it was rightly so registered, or whether it ought not rather to have been registered as a friendly society. On considering the matter I think it is quite clear that it is rightly registered as a trade union, but I think also that the fact of its being so registered, and rightly so registered, is not at all conclusive, and indeed has no real bearing, on the question we have to decide. The Act of 1871 dealt mainly, if not entirely, with trade unions, which under the then state of the law were deemed to be unlawful combinations by reason of some one or more of their purposes being in restraint of trade. That is the definition

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of trade union in s. 23. The Act for certain purposes made such combinations lawful, but in s. 4 it provided that nothing in that Act should enable any Court to entertain any legal proceeding instituted for the object of directly enforcing or recovering damages for the breach of certain agreements there specified between members of a trade union. There was a proviso to the section that nothing in it should be deemed to constitute such agreements unlawful, but nevertheless the wording of the section seems based on the assumption that such agreements could not in the then state of the law be enforced. Naturally that assumption would be made, because in that Act, as I have pointed out, the definition of trade union imported the element of unlawfulness on the ground of restraint of trade. Then came the Act of 1876, by s. 16 of which the definition of trade union was altered, and thenceforward in the two Acts, which were to be read as one, "trade union" meant any combination for the purposes there and in s. 23 of the previous Act set out, whether such combination would or would not have been an unlawful combination by reason of the doctrine as to restraint of trade if the Act of 1871 had not been passed. Consequently trade unions which may be registered now include both combinations which would have been unlawful before 1871 and also combinations which would not; but the restriction in s. 4 of the Act of 1871 as to Courts entertaining legal proceedings only applies to combinations which before 1871 would have been unlawful. The agreements of societies which would not have been unlawful before 1871 may still be enforced in the Courts now as they could before, because it is not necessary to resort to the Act of 1871 to enable that to be done. The result is that what we have to consider in the present case is not whether the defendants are or are not a trade union, but whether they are a society or combination of such a character that, before it was made lawful, as it clearly was for certain purposes, by the Act of 1871, the Courts would have refused to enforce the agreements between it and its members. Now the society here may certainly be described as a benefit society. It provides benefits to its subscribers in certain cases, amongst others in case of illness. The plaintiff's complaint is that when on sick pay he was fined 2*s.* 6*d.* and had

that sum deducted from his sick pay under the rules of the society for having been out of doors after a certain hour, notwithstanding that, being consumptive, he had been ordered by the doctor, according to the modern mode of treatment of that disease, to be out of doors, so that he might have been fined under another rule of the society a larger sum for disobeying the doctor's instructions. He appears to desire some declaration of the county court as to how these apparently inconsistent rules are to be construed, but in substance his action is to recover the 2*s.* 6*d.* which he suggests has been improperly deducted from his sick pay. I think, therefore, that the action is one to enforce or recover damages for the breach of an agreement for the application of the funds of the society to providing benefits for a member within the meaning of those words in s. 4 of the Act of 1871, and consequently it is an action which can only be maintained if it could have been maintained under the law which existed prior to 1871. The general objects of the society, as shewn by its rules, may be described to be to give relief to subscribers when out of work, not only by reason of illness or accident, but also in other cases, and particularly when out of work owing to strikes or trade disputes. Members may apparently subscribe to the sick fund without necessarily being "trade members" under rule 40 and becoming entitled to what are called trade benefits. I do not know that it would make any difference in this case if the plaintiff was a subscriber to the sick fund only and not to the trade fund. It possibly might, but no point was made of this in the county court or before us, and I think we must assume that he was a full member subscribing to everything. The parts of the rules which it is necessary to consider carefully are rule 40, as to trade fund, and rule 2, which states the objects of the society. The first object of the society is described as "(1.) trade benefit to existing members as per rule 40." Then come 2, 3, and 4, which relate to sickness, funeral expenses, and superannuation, which are quite unobjectionable. Then "5, payment of travelling relief as per rule 7," which has a slight bearing, but very slight, on the question of possible unlawfulness. Then 6 and 7, as to surgical and legal assistance, which I think are unobjectionable, and then "8, to regulate the

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relations between employers and workmen." These latter words are doubtless taken from the definition of trade union in the definitions of the Acts of 1871 and 1876, and possibly were intended to justify the registration as a trade union and secure the privileges of registration as such. I think, however, that too much importance ought not to be attributed to these words in considering what is the real object of the society, although, of course, they cannot be ignored, because by s. 14 of, and the First Schedule to the Act of 1871, in order to secure registration, the whole of the objects of the society must be set out in the rules, and doubtless it is the practice, as it is with framers of the memorandum of association of an intended company, to take power to do everything which may possibly or incidentally be required in order to prevent the objection as to things being ultra vires. I think we must look at the real objects as shewn by the rules, and certainly the provision of the so-called trade benefits must be taken to be a main object of the society, and it is only in the rules as to that that anything can be found which can be said to "regulate the relations between employers and workmen" or anything that can make the society an unlawful one. The word "regulate" is one not quite free from ambiguity. If to regulate means to interfere with, there is little to argue ; but the word in the rules must have the same meaning as in s. 16 of the Act of 1876, and there it seems to be assumed that a combination to regulate the relations of employers and workmen is not necessarily unlawful as being in restraint of trade. Regulate might perhaps be used with the meaning only of laying down or propounding rules ; but more strictly no one can be said to regulate unless he has power to enforce the rules he makes. Mr. Simon, in his very clear argument for the defendants in this case, suggested that the reason why the Courts had held that "regulating the relations between employers and workmen" was unlawful was because the Legislature had for a very long period of years taken on itself the regulation of such relations by Act of Parliament, and that it was unlawful to attempt to vary or perhaps even to supplement the regulations made by Parliament. If and so far as trade unions purport to make regulations which are to be binding on others than their own members it may possibly be

said that they are in some way usurping the functions of Parliament and thereby doing something unlawful. But I apprehend that trade unions hardly profess to do that. They bind their own members to observe certain rules, and they use all their influence to get those rules observed by all connected with the trade; but what they do is rather to get all to agree to abide by their rules than to claim anything analogous to legislative power of enforcing their rules. This society and others like it regulate the relations of employers and workmen, principally by binding by agreement their own members in regard to their relations to their employers, but partly, it may be, by putting pressure on employers by the power given by combination. It seems to me that the grounds for suggesting illegality are two. First, there may be illegality in the character of the influence which is exerted, which may amount to unlawful coercion. With that element we have nothing directly to do in the present case. Secondly, that with which I think we have to do in this case, namely, the doctrine as to restraint of trade. Speaking generally and without pretending to give an exhaustive definition, that doctrine is that it is unlawful to fetter by agreement the freedom of action of any one engaged in trade, as a trader or an employer or a workman, except so far as such fetter is reasonably necessary for the protection of the person seeking to impose such fetter upon others. That the question of reasonableness for the purpose of protection is material in considering rules of trade or benefit societies, as it is in the case of covenants restraining a person from carrying on a particular business, appears to be recognized by the Court in *Swaine* v. *Wilson*. (1) In that case, which was the one mainly relied on by counsel in his able argument for the plaintiff in the present case, the Court seems to have come to the conclusion that the society whose rules they were considering was not in itself an unlawful society having regard to its main objects, and they further held that even if the particular rules complained of in that case ought to be held illegal, so that those rules could not be enforced (which, however, I think they did not decide to be the case), still the fact of having some illegal and unenforceable rules would not prevent the enforcement of others

(1) (1889) 24 Q. B. D. 252.

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which were unobjectionable. This case, if in point, is of course binding on us; and, further, I cannot doubt that it is entirely correct. The judgment of Lindley L.J. explains the whole law most clearly, and the authority of that case is in no way shaken by the cases, such as *Old* v. *Robson* (1), where the Courts have come to the opposite conclusion as to the societies in question before them and have held the associations illegal. In the present case the rules sought to be enforced, namely, the rules as to giving sick pay and making certain deductions from the pay, are clearly legal, and even if some other rules would not be enforced that would not of itself prevent the Court entertaining the present action. We have to consider whether the association itself by reason of its main objects must be considered an unlawful one, and if it is, even its innocent rules cannot be enforced. I have very carefully read all these rules. I cannot help thinking there is somewhat less to point to as shewing illegality in the rules of this society than in any one which has yet been held by the Courts to be illegal, and there are observations of Hannen J. in his judgment in *Farrar* v. *Close* (2) (in which case the Court was divided) which appear well worthy of consideration, going to shew that these rules could not have been held illegal. That judgment, however, was dissented from by at least two of the judges in that case, and not quite agreed in by the fourth judge, who agreed in the result of it, but on different grounds, and probably it is not quite in accordance with the views expressed in other cases by other judges. Here clearly a main object of the society is to find funds to support workmen who are out of employment, including the case when they are out of employment by reason of their being on strike. This, no doubt, has the effect of enabling men to strike; in fact, it has the effect of providing funds for a trade war. I am not sure that this, if it stood alone, would be enough, and although there may be passages in judgments of various judges which seem to indicate that they thought this would be enough, I have not found any decision to that effect. What I think has to be found in order to make the association illegal is that the members agree to submit their own action to the decision of others and to strike or not as directed.

(1) (1890) 59 L. J. (M.C.) 41. (2) (1869) L. R. 4 Q. B. 602.

That would certainly make the society unlawful, and probably also it would be unlawful if the object is to combine for the purpose of putting pressure on employers and thereby to fetter their freedom of action. Now here we have provisions for the executive of this society considering and dealing with the questions which are the subject of any trade dispute, and they are to continue the "strike pay," as it is called in one rule, or the "dispute pay," as it is called in another, after six weeks, for which it is payable as of right, according as they approve or disapprove of the cause of the quarrel. If the true effect of all these rules were that all subscribers when out of employ should have in one shape or another relief from the society except in cases where in the opinion of the society the cause of their being out of employ was unreasonable conduct on their part in not taking employment, and the investigation of the cause of the quarrel was for the purpose only of ascertaining that, then I should come to the conclusion that the rules could not be considered illegal, and that in that view there was not enough to make us hold, by reason of the general words describing the objects of the society, that the society was illegal. I find, however, that by section 2 of rule 40 strike pay is only to be given in support of members endeavouring to secure certain objects—that is, to the fighters in the trade war. In the case of members thrown out of work by a strike of another class of workmen engaged in another branch of the same trade, a case which frequently happens in such trades as the building trade or the shipbuilding trade, the member, and also his fellow workers in his own class of work, may really be opposed to the strike, and if they are they appear under these rules to get no pay. The case of a lock-out is not in terms provided for, though probably the rules might be construed so as to cover it, and doubtless the money in that case would in fact be paid. It seems to me, however, that members who are mere victims of a trade fight and not fighters in it get nothing, and, that being so, it suggests strongly that the real object of this society is to provide funds for a fight, and, further, for a fight which is to be conducted subject to the approval of the executive. The freedom of action of members appears, therefore, to be fettered by their joining this society; and, further, one

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object is to fetter the freedom of action of employers. I think, therefore, that although there is perhaps somewhat less which could be objected to in this society than in most of the societies which have been before the Courts, and although the great majority of the rules and many of the objects of this society are not only unobjectionable, but even laudable, yet there is enough to shew that a main object of the society was to interfere with the free course of trade in such a way as to make it a society the rules of which could not prior to 1871 have been enforced. And although to me the rules of this society appear to be comparatively harmless, yet I think we should be going contrary to the authorities if we were not to hold that prior to the Act of 1871 it would have been an illegal society. That being so, the decision of the county court judge was right in substance, even if not quite correct in form, and the appeal must be dismissed, and with the usual consequences as regards costs.

SUTTON J. I have had an opportunity of considering the judgment of Channell J. and I agree with it.

J. E. A.

The plaintiff appealed.

1909. Feb. 3, 4. *Lush, K.C., J. A. Compston,* and *W. V. Ball,* for the appellant. This society is not a trade union, and if it is, this case does not fall within s. 4 of the Trade Union Act, 1871, which ousts the jurisdiction of the Court in certain cases. This society is mainly a friendly society, although certain of its rules deal with trade union matters. It is not a combination of the members of any particular trade, and the object of the society is not trade warfare. It contains nothing to fetter the freedom of either masters or men. Further, many of its members are not within the trade fund sections, but are merely benefit members. It is not an illegal association at common law, and if it is illegal at common law, s. 3 of the Trade Union Act, 1871, has taken away the illegality, and this action can be maintained, assuming that it does not come within s. 4. If the general objects are provident objects and the trade union rules are merely incidental, the existence of these rules will not make the

society illegal: *Swaine* v. *Wilson* (1); *Cullen* v. *Elwin* (2); *Old* v. *Robson*. (3)

This action is not instituted with the object of directly enforcing an agreement between members of a trade union or for the application of the funds of a trade union, and the plaintiff is entitled to a declaration and the return of the money: *Yorkshire Miners' Association* v. *Howden* (4); *Wolfe* v. *Matthews* (5); *Rigby* v. *Connol*. (6) At all events he is entitled to a declaration even if the Court will not grant substantial relief. There is nothing illegal in rules which enable a society to support strikes: *Denaby and Cadeby Main Collieries Co., Ld.* v. *Yorkshire Miners' Association* (7); *Smithies* v. *National Association of Operative Plasterers*. (8) There is no element here of injury to or oppression of the masters which would make this society illegal: *Mogul Steamship Co.* v. *McGregor, Gow & Co.* (9)

J. A. Simon, K.C., and *T. B. Napier*, for the respondent society. If the Trade Union Act of 1871 had never been passed, the constitution of the society is such that a member of it could not have contended that it had a legal existence. It would have been an illegal association, and he could not have maintained this action. This illegality would apply at common law to any association formed for the purpose of maintaining strikes. The main object of this society is to protect actual strikers against their masters, not to protect members against want of employment. The real test in these questions is to see what is the main object of the society, not what are the contents of a particular rule. This is not, as in *Swaine* v. *Wilson* (1), a friendly society, the purposes of which are unobjectionable; the rules restrict the member's freedom to work: rule 7, clause 2, section 4. Provision is made by rule 40, section 2, for combination with the object of securing by pressure on the employer improved conditions of labour, and that is illegal. In the seventeenth and eighteenth centuries the Legislature treated the

(1) 24 Q. B. D. 252.
(2) (1903) 88 L. T. 686; (1904) 90 L. T. 840.
(3) 59 L. J. (M.C.) 41.
(4) [1905] A. C. 256.
(5) (1882) 21 Ch. D. 194.
(6) (1880) 14 Ch. D. 482.
(7) [1906] A. C. 384.
(8) Ante, p. 310.
(9) [1892] A. C. 25.

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regulation of labour as an affair of the State and passed many Acts of Parliament for that purpose, with the result that combinations of workmen were illegal: *Rex* v. *Journeymen Taylors of Cambridge*. (1) In the Acts of 5 Geo. 4, c. 95, and 6 Geo. 4, c. 129, a long list of the old Acts is given and they were repealed. This is, notwithstanding the Act of 1871, an illegal society. It may not be illegal to insure oneself against being thrown out of work by strikes, but it is illegal to take funds which one member has subscribed for a particular purpose and pay them to other members who are on strike: *J. Lyons & Sons* v. *Wilkins*. (2) The question is not whether members are bound by the rules to do a particular thing, but whether they get a benefit by doing it.

[COZENS-HARDY M.R. The Conspiracy and Protection of Property Act, 1875, legalizes strikes in the broadest terms: *Connor* v. *Kent*. (3)]

It does not follow because the members cannot be indicted that one of them can bring an action: *Hornby* v. *Close*. (4) This is not a mutual insurance society; there is no agreement for good consideration by one person to insure another; they all subscribe to a common fund, and, assuming that this kind of insurance against suffering by strikes is legal, which cannot be admitted, there is nothing to give each member a right to bring an action against the society. The real test to be applied is the consideration whether the common law regards these combinations as legal, and it is submitted that it does not.

[FLETCHER MOULTON L.J. The Act of 1875 does not say that the agreement shall be enforceable, but it throws on you the onus of shewing that it cannot be enforced on some other ground than the illegal status of the society.]

The Act of 1875 does not affect the right of enforcing contracts. It merely enacts that members shall not be prosecuted: *Old* v. *Robson* (5); *Chamberlain's Wharf* v. *Smith* (6); *Burke* v. *Amalgamated Society of Dyers*. (7) Here the society could

(1) (1721) 8 Mod. Rep. 12.
(2) [1896] 1 Ch. 811, 828.
(3) [1891] 2 Q. B. 545, 558.
(4) (1867) L. R. 2 Q. B. 153.
(5) 59 L. J. (M.C.) 41.
(6) [1900] 2 Ch. 605.
(7) [1906] 2 K. B. 582.

always interfere in strikes, for rule 40, section 6, does not affect the power of the executive committee to do so. By section 4, after six weeks this would be simply a combination to maintain strikes. That is enough to disqualify the plaintiff: *Sayer* v. *Amalgamated Society of Carpenters and Joiners.* (1) Rule 40 shews the main object of the society; therefore the society itself is illegal.

Lush, K.C., in reply.

Cur. adv. vult.

March 1. The following written judgments were delivered:—

COZENS-HARDY M.R. The plaintiff is a member of the Bristol, West of England, and South Wales Operatives' Trade and Provident Society. He commenced proceedings in the county court, claiming the return of 2*s.* 6*d.*, the amount of a fine alleged to have been wrongfully imposed upon him, and claiming certain declarations as to the effect of the rules of the society as the foundation of the claim for repayment. The defendants relied upon the provisions of s. 4 of the Trade Union Act, 1871, as depriving the Court of jurisdiction. The county court judge adopted this contention and gave judgment for the defendants on the ground of no jurisdiction. The Divisional Court dismissed the plaintiff's appeal on the same ground.

The defendant society is registered under the Trade Union Acts, 1871 and 1876. But it is important to observe that a trade union may be either a lawful combination or an unlawful combination by reason of some one or more of its purposes being in restraint of trade (s. 16 of the Act of 1876). It is a common mistake to suppose that every trade union is, apart from the Act of 1871, an unlawful combination. The Act of 1871 provides (s. 3) that the purposes of a trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust. That is followed by s. 4, which enacts that "nothing in this Act shall enable any Court to entertain any legal proceeding" instituted with the object of directly enforcing or recovering damages for the breach of (inter alia) "any agreement for the application of the funds of a trade union to provide benefits to members." The plaintiff was

(1) (1902) 19 Times L. R. 122.

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entitled to sick pay under the rules, and the fine of 2*s.* 6*d.* was deducted from his sick pay. If, therefore, the plaintiff would have to rely upon s. 3, I think s. 4 would be fatal. If, however, he has a right of action apart from the Act of 1871, there is nothing in the Act of 1871 to take away or affect his right. It is necessary carefully to consider the rules of the society. At the very beginning is the statement "This society is a trade union"—a statement which is innocuous. The members are "operatives," but not confined to any particular trade. By rule 2 the objects of the society are stated. [His Lordship read this rule, and continued:—] Of these objects No. 1 is the only material one, for No. 8 is colourless. Rule 40 deals with certain benefits called dispute pay (which I assume to be the same as strike pay), travelling relief, and other assistance. Sections 2, 4, and 6 are the only material sections. [His Lordship read them, and continued:—] Now, there is nothing illegal in a strike, although it may be attended with circumstances, such as breach of contract or intimidation, which make it illegal: *J. Lyons & Sons* v. *Wilkins*. (1) Nor is there anything illegal in contributing for the support of strikers: *Denaby and Cadeby Main Collieries Co., Ld.* v. *Yorkshire Miners' Association*. (2) There is nothing in the rules which authorizes the calling out of members or the assisting a strike, and section 6 shews that any such action is expressly prohibited. It seems to me that the society is really a mutual insurance society against sickness and loss of wages by reason of shortness of work (called travelling relief, rule 7), or by reason of voluntary abstention from work (called strike pay). It is a harmless friendly society and there is nothing unlawful in its objects. The judgment of this Court in *Swaine* v. *Wilson* (3) applies to the present case. Even if one particular rule in a society of this nature could be pointed out as being in restraint of trade, it would not prevent the Court from exercising jurisdiction for a breach of other rules not open to that objection. But in my opinion there is no such objectionable rule in the present case. It follows that in my opinion the county court judge was wrong in declining jurisdiction. I have carefully

(1) [1896] 1 Ch. 811, 822, 828. (2) [1906] A. C. 384, 393, 406.
(3) 24 Q. B. D. 252.

read and considered the judgment of Channell J. His general propositions seem to me to be perfectly accurate, and he evidently felt considerable hesitation in applying them to the present case. He stated that there was less to point to as shewing illegality in the rules of this society than in any one which had yet been held by the Courts to be illegal, but he considered there was just sufficient to make the society illegal. With great respect to the learned judge, I think this society is just inside the limits of legality. The orders of the county court and the Divisional Court must be discharged, and the case must be remitted to the county court to be heard on its merits. The respondents must pay the costs in both Courts and of this appeal.

FLETCHER MOULTON L.J. This appeal is in form an appeal from the refusal of a Divisional Court to make absolute a rule for a prohibition (or in the alternative for a certiorari) in the matter of a plaint in the Aberdare County Court. Nothing, however, turns upon the form of the rules. The sole point is one of substance and arises out of the following facts, none of which are in dispute.

The plaintiff is a member of the defendant society, and the action was for 2*s.* 6*d.* which he alleged to be due to him as sick pay under the rules of the society. He also asked in the action for certain declarations relative to his rights as a member of the society the nature of which it is not necessary to examine. The sole defence raised was that the Court had no jurisdiction to hear the complaint by reason of the provisions of s. 4 of the Trade Union Act, 1871. The judge held that the defendants were right in this contention and the Divisional Court has sustained his decision. We have now to decide whether this view was correct. If it was not the case must go down to him to be heard.

In order to sustain this contention the defendants must shew (1.) that apart from the Trade Union Acts of 1871 and 1876 they could not be sued by the plaintiff by reason of their being an illegal association, and (2.) that the nature of the plaint brings it within the provisions of s. 4 of the Trade Union Act, 1871, so that the legalization of the society by that Act does not give

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to the Courts any increased jurisdiction to entertain this particular plaint. If the defendants can substantiate both these contentions the society must be taken for the purposes of this plaint to be an illegal association and the action is unsustainable.

So far as the real subject-matter of the action is concerned, namely, the recovery of the 2*s.* 6*d.* alleged to be due to the plaintiff as sick pay, I have no doubt that it comes within the provisions of s. 4. With regard to the declarations asked I do not propose to give any decision, as in the view I take of the rights of the parties it is not necessary to do so. But I am not prepared to say that the Courts may not properly be asked to make declarations as to the meaning and effect of rules of trade unions, even though it cannot enforce claims under them. The Court has jurisdiction to give a declaratory judgment even when no relief is asked, and though it would no doubt hesitate to do so in matters which from their nature could not give rise to claims which they would have jurisdiction to entertain, this is not the case with trade union rules. In *Denaby and Cadeby Main Collieries Co., Ld.* v. *Yorkshire Miners' Association* (1) the House of Lords granted an injunction to prevent money being paid away out of the funds of a trade union for purposes not sanctioned by the rules, and if the holders of the funds, or members who are interested in those funds and entitled to see that they are not wasted, were to apply to the Courts in a proper case for a declaration as to the meaning of the rules as bearing on the distribution of the funds, I do not, as at present advised, see any sufficient ground for the Court refusing to give its assistance. But I do not give any decision on the point and shall treat the case as though the payment of the 2*s.* 6*d.* were the only thing sought by the action. In other words, I shall treat the defendants as having established the second contention if they can sustain the first and more fundamental one. The case, therefore, turns on our answer to the question ;—Apart from the provisions of the Trade Union Acts, 1871 and 1876, would the defendant society be an illegal association ?

To answer this question it is necessary to examine the purposes for which the defendant society is formed and the means

(1) [1906] A. C. 384.

whereby it proposes to effect those purposes. If either of these be illegal, it may be necessary to examine more closely into the nature of that illegality to see whether it is of such a kind as to taint the whole constitution of the society and make it an illegal society. But if there is no illegality in either respect it is impossible to refuse to it a legal status which would entitle the plaintiff to bring it before the Courts. It follows, therefore, (and both parties agree as to this,) that the question must be decided entirely by an examination of the contents of the printed book of rules of the society. These rules define its constitution and objects and set forth the detailed rules adopted by it for carrying out those objects.

Nothing turns on the name and constitution of the society. It is true that it is stated in limine that "the society is a trade union" and it is registered as such. But this is a perfectly neutral statement, because since the alteration of the statutory definition of a trade union by the Act of 1876 it no longer implies that the society would have been an unlawful combination at common law before the Act of 1871 was passed. No. 8 of the objects is, in my opinion, equally neutral in its bearing on the question before us. It states that one of the objects of the society is "to regulate the relations between employers and workmen." This connotes nothing illegal. It would apply to a society which aimed at promoting the practice of appeals to arbitration in trade disputes. Unless illegal means are used it is impossible to suggest that it is illegal to try to regulate such relations, and it is not suggested that there is any indication of an intention of using illegal means, unless it be contained in rule 7, section 4, or in rule 40, which I am about to examine particularly.

It will be convenient forthwith to deal with rule 7, clause 2, section 4, for it is a very subsidiary matter, and though relied upon by counsel for the defendants it was not very strenuously pressed. Rule 7, clause 2, section 4, reads as follows: "Should work be offered at the current rate of wages to any member receiving travelling relief, unless it be to fill the place of those fighting for better conditions, and he refuses to accept it, his allowance shall be at once stopped, and his card filled up."

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The object of this rule is to prevent the funds of the society being drained by payments to members who can get work on normal terms but prefer to be idle. That those who act thus without reasonable excuse should no longer receive payment from the society on the ground of being out of work is just. The only objection raised to the rule is that it shews that the society regards it as a reasonable excuse that the work offered is to fill the place of those fighting for better conditions. I can see no reason why the society should not look upon this as a reasonable excuse, seeing that to accept the work would be to draw down upon the member the reprobation of his fellow workmen, and probably to injure seriously his chance of future employment and increase the probability of his becoming a permanent burden on the society. In my opinion the rule without the exception would be both unjust in its working and unwise. There is certainly nothing illegal in a society like this recognizing the existing state of our social organization and acting so as to protect its funds so far as it can do so without exposing its members to annoyance.

The main argument on behalf of the defendants rested on rule 40, and rightly so. This rule is clearly one of great importance. The first in numerical order of the "objects of the society" is to provide "trade benefit to existing members as per rule 40," and rule 40 provides, amongst other things, for strike pay. To understand the matter properly it is necessary to state that the society has two types of subscriptions the produce of each going into a separate fund. The one is to provide sick pay and the like, and so far as this subscription is concerned the society is for all practical purposes merely a friendly society. But members of the society may, but not must, subscribe to the trade fund and thereby become entitled to trade benefits under rule 40, and perhaps (though this is not quite clear) to travelling allowance under rule 7. The formation and application of this trade fund is therefore a separate and distinct object of the society. It was pressed upon us on behalf of the plaintiff that nevertheless it was not the main object of the society, and certain authorities were quoted which speak of the main object as that which must be looked to. I do not think that such a contention is sound.

So soon as it is clear that one of the objects of a society is a separate and distinct object and that it is carried out independently no question of its order of importance can have any legal bearing or effect. For all legal purposes such objects are co-ordinate. They possess the same status. It may be different in cases where one is ancillary and subordinate to another and is solely for the purpose of more effectively accomplishing it. The Courts may then take the latter as the real or main object and consider with regard to the other whether it so alters the primary object of the society as to affect its legal status. But no such question can come in where the objects are independent and therefore co-ordinate, and I shall consider the questions arising out of rule 40 as though the giving of these trade benefits were a principal object of the society.

It is not suggested on the part of the defendants that there are any provisions for making or enforcing agreements for strikes or for taking any part therein. On the contrary, by rule 40, section 6, it is specifically provided that no officer or member shall be authorized or permitted to take any active interest in, aid in any way, or otherwise assist any trade movement, except in his private capacity. But under section 2 and section 4 of rule 40 it is provided that when a strike takes place for the purpose of bettering or defending existing conditions of labour trade members shall receive strike pay at the rate of 1*s.* 8*d.* per day for the first six weeks, and the executive committee are empowered, should the strike continue, to extend this period if after consideration they deem it necessary so to do. Counsel for the defendants contend that these rules by providing for the payment of strike pay facilitate strikes, because strike pay prevents workmen from being driven to abandon them by the imminence of starvation to themselves and their families. This they say is sufficient to make an association which has the giving of strike pay as one of its objects an illegal association independently of the relieving provisions of the Trade Union Acts.

This appears to me to be a tremendous conclusion to be based upon such slight premisses. Strikes are well-known occurrences in the labour world, and every workman who is prudent and realizes his duty towards those who depend on him will take

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steps to provide against the suffering they bring. Every time a workman practises thrift he facilitates his taking part in future strikes, and no doubt that intention is present when he thus acts, and it is strange that such a motive should be held to be tainted with illegality. I cannot see that it makes any difference that this object is effected by a specific provision with regard to strikes as, for instance, by an insurance against them, whether on the mutual principle or otherwise. Every workman, however pacific in his nature, must know that he may find himself involved in a strike, and to say that he may not insure himself against the inability to sustain himself and his family, should one occur, is to my mind so unreasonable that it would require to be supported by overwhelming authority before I could accept it. So far from this being the case, I can find no authority at all in its favour, and what a workman does by becoming a trade member of the defendant society is (so far as this matter is concerned) neither more nor less than to join a mutual insurance society against loss of wages during strikes.

But the real fallacy of the argument on the part of the defendants lies deeper. It proceeds on the proposition that strikes are per se illegal or unlawful by the law of England. In my opinion there is no foundation for such a proposition. It is true that occasional dicta are to be found to the effect that combinations to better the conditions of labour are unlawful at common law, but the Courts have never accepted the law thus laid down, and eminent judges have expressed views to the contrary. But the point is, in my opinion, best decided by an examination of the actual decisions of the Courts. There is no trace of any such doctrine during the centuries when the common law of England was formed, nor in fact until the end of the eighteenth century. This was not due to any friendliness towards freedom of action on the part of workmen in this respect. On the contrary, during the seventeenth and eighteenth centuries a long succession of legislative enactments were passed restricting with a severity which shocks our modern ideas all attempts on the part of workmen to better their conditions of labour. Yet during the whole of this period no Court treated combinations to better the conditions of labour as being contrary to common

law, and none of these statutes purported to declare or rest upon the common law. If we except an obiter dictum by Grose J. in *Rex* v. *Mawbey* (1) (which to my mind was not intended to refer to the common law, but to the effect of statutes then in force), I cannot find that there were any judicial dicta in support of the suggested proposition until after the Legislature swept away all these statutes by the Act of 1825. It does not surprise me that after the Courts had for such a long series of years been occupied in enforcing statutable prohibitions of very varied kinds against combinations among workmen there should come to be an idea in some minds that the common law itself must have disapproved of that which legislation so persistently persecuted. But conclusions as to the common law which first appear in recent times and are based on no accepted principle of earlier date are to be looked upon with great suspicion. Even since 1824 the weight of authority is against this doctrine. Strikes per se are combinations neither for accomplishing an unlawful end nor for accomplishing a lawful end by unlawful means, and I therefore come unhesitatingly to the conclusion that the fact that the arrangements for giving strike pay do in a sense facilitate strikes is quite immaterial for the purposes of our decision, and that the defendant society does not become illegal by reason of its having this as one of its objects, and that therefore the plaintiff was entitled to have his case heard by the judge of the county court.

I have not so far referred to the Conspiracy and Protection of Property Act, 1875, and I do not propose to rest my judgment in any way upon it. It is unnecessary so to do, because I hold that strikes in themselves are not unlawful by common law. But if I had come to a different opinion on this point, the only ground upon which an agreement simultaneously to decline to work on proposed conditions could be held to be unlawful would be that it was one of the instances where a combination by two or more persons to do an act permissible to a single individual can be held to be unlawful. It is clear that any single individual is within his rights in refusing to work on any proposed conditions if he chooses so to do. If I had been of opinion that

(1) (1796) 6 T. R. 619, 636.

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strikes came within the above category for this reason, I should still have held that the appeal must be allowed, because by s. 3 of the Conspiracy and Protection of Property Act, 1875, an agreement or combination by two or more persons to do or procure to be done any act in contemplation or furtherance of a trade dispute between employers and workmen shall not be indictable as a conspiracy if such act committed by one person would not be punishable as a crime. This would render agreements to strike simpliciter lawful, because it removes the only ground on which they could be held unlawful.

In conclusion I ought perhaps to notice an argument which was strongly pressed upon us on behalf of the defendants, that the power of the executive committee to prolong the period during which strike pay may be paid made them responsible in some way for the strike itself and rendered them an illegal association. I must confess that I cannot follow this argument. Supposing that the regulation had been that the strike pay should last during the whole period of the strike unless the executive committee chose to stop paying it after the expiry of six weeks, the effect of the regulation would be substantially the same as it is at present, so that if we were to accept this argument it would be equivalent to saying that any discretionary power in the executive committee, whether to pay or to stop payment, rendered them responsible for the strike. This appears to me to be absurd, but it is not necessary to examine the regulation further, inasmuch as the grounds of my decision are not affected by it.

I am therefore of opinion that this appeal should be allowed with costs here and below, and that the action should go back to the county court judge to be tried.

BUCKLEY L.J. I desire to say at the outset that I do not in any way rest my decision upon the Conspiracy and Protection of Property Act, 1875. The case falls to be decided, in my judgment, upon a proper understanding of the nature of this society and of its rules.

The society is composed of members who are not necessarily members of any one trade, but who may be members of any one

of a number of different trades, or may not be engaged in any trade at all. They are persons who are to act in combination for the objects defined in the rules. Combination is, of course, not in itself illegal. A combination to save a man from drowning or to procure the arrest of a fugitive from justice, or for any lawful object, is of course perfectly legitimate. Conspiracy (which is the general expression for illegal combination) means the combination of persons to do an illegal act or to effect a legal act by illegal means. There are certain acts which one person may lawfully do alone, but which several persons cannot lawfully do in combination. Further, as matter of general principle, some rules even in restraint of trade are, if reasonable, valid. The maintenance of a strike is not necessarily illegal. I adhere to what I said in *Smithies* v. *National Association of Operative Plasterers* (1) as to the true effect of the decision of the House of Lords in *Denaby and Cadeby Main Collieries, Ld.* v. *Yorkshire Miners' Association.* (2) If a strike have taken place even in breach of contract, but the broken contracts have expired, those who help to maintain the strike by supporting the workmen after their current contracts have expired in a refusal to enter into new contracts of service on new terms are not doing anything illegal. Further, if the general objects of the society are not illegal, it is legitimate, upon the authority of *Collins* v. *Locke* (3) and *Swaine* v. *Wilson* (4), to inquire, notwithstanding the existence of some rules which might be in restraint of trade and thus illegal, whether the general objects are not free from that objection.

Looking at these rules, and having regard to the above considerations, my view of them may be shortly expressed by saying that, so far as trade benefits are concerned, the rules amount to no more than insurance of the members against the consequences of a strike. Provisions to encourage or procure a strike may be illegal. Provisions for the assistance of the victims of a strike may be perfectly legal. In these rules I can find no provisions addressed to the procurement or even the sanction of a strike. The rules do not, it is true, as did the rules in *Swaine* v.

(1) Ante, p. 310.
(2) [1906] A. C. 384.
(3) (1879) 4 App. Cas. 674.
(4) 24 Q. B. D. 252.

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Wilson (1), provide that one of the objects shall be to render assistance to members when out of employment, but rule 7 is really a rule in this direction. It contemplates that a member is in search of work, gives him assistance when out of employment, and provides by section 4 that his allowance shall be stopped if he refuses work at the current rate except in an event, namely, that he is asked to fill the place of one fighting for better conditions. Here is a scintilla of assistance to maintaining a strike. This may fall into the observations which I have to make upon the principal rule in this connection, namely, rule 40. The effect of that rule, I think, is that if a strike takes place (section 4) members are to have assistance, but that that assistance even is not available in the case of all strikes, but only (section 2) in support of certain strikes, while by section 6, which seems to me of first-class importance in this connection, it is provided that no officer or member shall take any active interest or aid in any way or otherwise assist any trade movement except in his private capacity. This is a direct veto upon procuring or inciting a strike. That the rules to a certain extent assist a strike by giving assistance to persons when there is a strike is true. But upon the authority of *Denaby and Cadeby Main Collieries, Ld.* v. *Yorkshire Miners' Association* (2) this is, within proper limits, not illegal. I find nothing here to exceed proper limits.

My conclusion, therefore, upon reading these rules, is that there is not here any such provision in restraint of trade as to render the society illegal. Under these circumstances, the questions which have been argued upon the several Acts of Parliament do not arise. The decision appealed from is one which affirms that there was no jurisdiction to entertain the action. In my opinion this decision is erroneous, and the case ought to go down for trial. As to the costs, I agree with the Master of the Rolls.

Appeal allowed.

Solicitors: *Smith, Rundell & Dods, for W. R. Edwards, Aberdare; Rawle, Johnstone & Co., for Benson, Carpenter & Co., Bristol.*

(1) 24 Q. B. D. 252. (2) [1906] A. C. 384.

H. C. R.

[IN THE COURT OF APPEAL.]

C. A.
1909
March 4.

CHAPMAN *v.* SMETHURST.

Promissory Note—Company — Signature by Managing Director—Personal Liability.

A promissory note wa signed by the managing director of a company in the following form :—"Six months after demand I promise to pay to Mrs. M. Chapman the sum of 300*l.* for value received together with six per cent. interest per annum. J. H. Smethurst's Laundry and Dye Works, Limited. J. H. Smethurst, Managing Director." In an action upon the note against the managing director :—

Held, that the note was the note of the company, and that the defendant was not personally liable.

Decision of Channell J., ante, p. 73, reversed.

Appeal of the defendant from a decision of Channell J. reported ante, p. 73.

The defendant had previously to 1893 carried on a laundry business. In that year he converted the business into a company, taking himself practically the whole of the ordinary shares and being one of the two directors. The company had power under its memorandum and articles to borrow money on promissory notes. In September, 1900, the defendant and his co-director borrowed 300*l.* for the company from the plaintiff for the purpose of improving the company's premises, and a promissory note was given to the plaintiff which was in the following terms :—

"Six months after demand I promise to pay to Mrs. M. Chapman the sum of 300*l.* for value received together with six per cent. interest per annum.

"J. H. Smethurst's Laundry and Dye Works, Limited.
"J. H. Smethurst, Managing Director."

The words "J. H. Smethurst's Laundry and Dye Works, Limited" and the words "managing director" were stamped on the note by means of rubber stamps. The body of the note and the actual signature "J. H. Smethurst" were in writing. The money borrowed was applied to the company's purposes, and the interest was from time to time paid by the company's cheques. The plaintiff sued the defendant as being personally liable upon

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the note. Channell J. held (see ante, p. 76) that the defendant was personally liable and gave judgment for the plaintiff. The defendant appealed.

Henlé, for the defendant.

Barnard Lailey, for the plaintiff.

[The arguments were the same as in the Court below. The following additional cases were referred to by the Court: *Aggs* v. *Nicholson* (1); *Okell* v. *Charles*. (2)]

VAUGHAN WILLIAMS L.J. I am of opinion that this appeal must succeed. I think that any one reading this promissory note would at once say that it was one which made the company liable. Above the signature of the defendant is the rubber stamp signature of the company; it is the very signature of the company ordinarily used in its business. Turning to s. 47 of the Companies Act, 1862, which deals with the making of bills of exchange and promissory notes by limited companies, we see that "a promissory note or bill of exchange shall be deemed to have been made, accepted, or endorsed on behalf of any company under this Act, if made, accepted, or endorsed in the name of the company by any person acting under the authority of the company, or if made, accepted, or endorsed by or on behalf or on account of the company, by any person acting under the authority of the company." No question arises here as to the authority of the defendant to sign the promissory note; it is admitted that he had the company's authority to do so. To my mind, when you have once got a promissory note so drawn as to bind the company, and when the form of the note is such that no question of joint liability can possibly arise, it almost conclusively shews that the note is in such a form that the company alone is liable, and I have no doubt that the company is alone liable on this particular note. Under the circumstances of the case it seems impossible to say that the defendant is personally liable merely because he placed the signature "J. H. Smethurst, Managing Director," under the words which indicated that the note was made on behalf of the company.

(1) (1856) 1 H. & N. 165. (2) (1876) 34 L. T. 822.

I need not go at length through the cases which have been cited; all the authorities on the point are set out in Chalmers on Bills of Exchange, 7th ed. at pp. 86, 376. I may just mention *Lindus* v. *Melrose* (1), to which our attention was called in argument. There the form of the promissory note was, "Three months after date we jointly promise to pay Mr. Frederick Shaw, or order, six hundred pounds for value received in stock on account of the London and Birmingham Iron and Hardware Company, Limited," and it was signed "James Melrose, G. N. Wood, John Harris, Directors." It was held that the note was binding on the company, and that the directors who signed it were not personally liable. The next case to which I need refer is *Dutton* v. *Marsh* (2), where the note ran, "We the directors of the Isle of Man Slate and Flag Company, Limited, do promise to pay . . . . ," and it was signed by "Richard Marsh, Chairman, Joseph Higgins, Samuel Broadbent, Henry Johnson"; in the left-hand corner were the seal of the company and the signature of a witness attesting the affixing of the seal. In that case it was held that, notwithstanding the presence of the company's seal, the directors were personally liable. That case seems to be entirely different from the present one; it was impossible on the facts to hold the company liable. Then comes *Alexander* v. *Sizer* (3), which is more like the present case. There the promissory note ran, "On demand I promise to pay Messrs. Alexander & Co., or order, the sum of . . . . ," and it was signed "For Mistley, Thorpe, and Walton Railway Company, John Sizer, Secretary." It was held that the secretary was not personally liable. It is true that in the present case the promissory note does not profess to be signed "for" or "on account of" the company, but we have that which is equally strong to shew that the company intended to be bound by the note, that is, the stamped signature of the company at the foot of the note and placed over the written signature of the defendant. I need not refer to any other cases. The decisions are bound to run rather near each other when the Court has to determine whether the company or the directors who sign a

(1) (1857) 2 H. & N. 293; 3 H. & N. 177. (2) (1871) L. R. 6 Q. B. 361.
(3) (1869) L. R. 4 Ex. 102.

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promissory note are liable upon it; but when, as in the present case, the authority of the managing director to make this document on behalf of the company is once admitted, there is very little more required in order to establish the company's liability.

KENNEDY L.J. I am of the same opinion on both points. I agree with Channell J. when he says that the question "depends upon the intention of the parties, which intention I think must be gathered from the terms of the document alone. I do not think it is possible upon this document to say that it was a promise of both." The case has indeed been argued on the basis that it is not a joint, or a joint and several, promissory note, but is the note of one party only, and the only question is whether the company or the defendant is liable upon it as promisor. Treating the signature as a composite signature, I am of opinion that the only result is that the payee of the note got the company for his debtor; the company's signature was affixed by means of its official stamp and was vouched by the signature of the managing director. The proper test to apply in such cases is laid down in Lindley on Companies, 6th ed., vol. i. at p. 280, where it is said: "The question is in every case one of construction; is the bill or note the bill or note of the company or not? Does it really purport so to be? for, although given for the purposes of the company, the bill or note may not even purport to bind it. If on the true construction of the instrument the bill or note is the bill or note of the company, the company will be liable upon it, and not the individuals whose names are on it, unless the bill or note is the bill or note of both. On the other hand, if on the true construction of the bill or note it is not the bill or note of the company, the persons whose names are upon it will be liable upon it, whether they intended to be so or not." In the present case I endeavour to put myself in the position of a person who asks himself the question whether he has a good cause of action against the company. If the company had power to issue promissory notes, and Smethurst, the defendant, had authority from the company to sign promissory notes for them, what possible defence could the company have to an action? I agree that in this class of case it is not easy to form a confident opinion, but

the document in question here does not, I think, present any great difficulty of interpretation.

JOYCE J. I agree. In my opinion the promissory note in question prima facie appears, and would be taken by any ordinary person to be, the note of the company and of no one else. It is made in the name of the company as allowed by s. 47 of the Act, and there is not any question as to the authority of the person who affixed the name or signature (if it can properly be so called) of the company by means of the stamp. The only thing that raises a doubt in my mind is the use in the body of the note of the singular personal pronoun "I" instead of the plural "we," or "we, J. H. Smethurst's Laundry and Dye Works, Limited," which perhaps would have been better English; but this is not in my opinion sufficient to alter the prima facie effect of the affixing of the name of the company as it was affixed. The signature of the managing director I consider to have been added merely as indicating the person by whom the name of the company was affixed or as otherwise validating the making of the note in the name of the company.

Appeal allowed.

Solicitors for plaintiff: *Mackrell & Ward, for H. J. Whitehead & Son, Cambridge.*

Solicitors for defendant: *Morten & Cutler.*

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TURNER (Surveyor of Taxes), Appellant *v.* CARLTON, Respondent.

Revenue—Income Tax—Inhabited House Duty—Annual Value of Premises—Premises let on Lease—Covenant by Lessor to pay Fire Insurance Premium—Deduction—Annual Value adopted for preceding Year—Conclusiveness—Finance Act, 1905 (5 *Edw.* 7, *c.* 4), *s.* 6, *sub-s.* 3—*House Tax Act*, 1808 (48 *Geo.* 3, *c.* 55), *Sched. B—House Tax Act*, 1851 (14 *&* 15 *Vict. c.* 36), *ss.* 1, 2; *Schedule—Income Tax Act*, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 60, *Rule No.* I.—*Income Tax Act*, 1853 (16 *&* 17 *Vict. c.* 34), *s.* 2, *Sched. A.*

By s. 6, sub-s. 3, of the Finance Act, 1905 (which is a common form provision in the Finance Act of most years), "the annual value of any property which has been adopted for the purpose either of income tax under Schedules A and B in the Income Tax Act, 1853, or of inhabited house duty, during the year ending on April 5, 1905, shall be taken as the annual value of such property for the same purpose during the next subsequent year," but this provision is not to apply to the metropolis :—

Held, that the annual value adopted for the preceding year was by the above provision made conclusive of the annual value of the property during the next subsequent year for income tax and inhabited house duty.

Semble, where the lessor of premises covenants to pay the fire insurance premium thereon, a deduction in respect of the premium so paid cannot be made from the rent payable to him by the lessee for the purpose of arriving at the annual value of the premises for assessment to income tax under Sched. A and inhabited house duty.

Case stated by the General Commissioners of Income Tax for the division of Kensington, in the county of Middlesex.

At a meeting of the Commissioners the respondent appealed against an assessment of 1500*l.* made upon him under Sched. A of the Income Tax Acts and for inhabited house duty for each of the two years ending April 5, 1905, and April 5, 1906, in respect of premises known as the Ealing Theatre and Lyric Hall and Restaurant.

A reduction of one-sixth for the purposes of collection had been allowed under the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 35, in respect of the assessment under Sched. A. The annual value of the premises adopted for Sched. A and inhabited house duty during the year ending April 5, 1904, was 1500*l.*

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The respondent was the occupier of the premises, which together with other subjects he held from the Law Guarantee and Trust Society, Limited, under a lease for three years dated September 29, 1903, at the clear rent of 525*l.* for the first half-year up to March 25, 1904, and at the clear yearly rent of 1600*l.* for the remainder of the term. The premises were situate outside the area to which the Valuation (Metropolis) Act, 1869, extended.

By the lease there was included with the premises let thereunder the furniture and contents of the theatre and hall and restaurant, pictures, glass, linen, &c. It was stated in evidence that the furniture, contents, pictures, glass, linen, &c., were valued at 4200*l.*, and that the respondent agreed to pay 210*l.* per annum included in the rent in lieu of buying the same at the valuation of 4200*l.*

The lease also provided that if anything should be done upon the premises which should cause the premium charged for fire insurance to exceed 429*l.* per annum (the then total premium for fire insurance of the premises on policies amounting to 48,000*l.*) the respondent should give notice to the lessors and pay the extra premium.

The lease further provided that the lessors should insure the premises to the extent of 48,000*l.* against fire and should pay the ground rent, and also that if the respondent should be desirous of taking a new lease of the premises, including fixtures and the furniture, he should have the option of doing so on the terms therein contained.

It was proved and admitted that the annual fire insurance premium payable by the Law Guarantee and Trust Society under their covenants in the lease amounted to 429*l.*, of which 397*l.* 10*s.* related to the insurance upon the fabric of the premises and 31*l.* 10*s.* to the furniture and contents.

It was also proved and admitted that the gross estimated rental in the poor rate assessment in respect of the premises for the year 1904 and up to September 21, 1905, was 1500*l.*, the rateable value being 1000*l.*, and from September 21, 1905, up to April 5, 1906, 1000*l.*, the rateable value being 850*l.*; and it was also admitted that the average rental reserved by the lease for the three years was 1509*l.*

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The respondent contended that for the purpose of arriving at the amount of the annual value for assessment in relation to income tax, Sched. A., and inhabited house duty there should be deducted from this average amount of 1509*l.* the sum of 130*l.*, the amount of the assessment on No. 19, The Broadway (other property included in the lease), 210*l.* for the rent of the furniture and contents as aforesaid, and 397*l.* 10*s.* the amount of the fire insurance premium in respect of the fabric of the premises, thus leaving 771*l.* 10*s.* as the net amount; that to this should be added 116*l.* for internal repairs, as, under the covenant in the lease, such repairs were to be done by the respondent (1), and thus the gross assessment would be 887*l.* 10*s.*

The respondent definitely stated that he would not have entered into the lease unless the lessors had consented to pay the sum of 397*l.* 10*s.* for the insurance on the fabric of the premises, and he contended that the real annual value of the premises was the above-mentioned sum of 887*l.* 10*s.*, i.e., the rent as above calculated less the sum of 397*l.* 10*s.*, or alternatively that, if he had had to pay the insurance or had paid insurance by way of additional rent, the annual rent reserved by the lease would have been less than it was by 397*l.* 10*s.*

No objection was raised by the appellant on behalf of the Crown to the deduction from the average rent of the sums of 130*l.* and 210*l.* above mentioned, or as to the sum of 116*l.* being the right addition for repairs.

With regard to the deduction claimed in respect of 397*l.* 10*s.*, the fire insurance premium, the appellant contended (inter alia)—

(1.) That the respondent was not entitled under s. 60 of the Income Tax Act, 1842, Rules No. IV. of Sched. A, to the deduction from the gross assessment of the sum of 397*l.* 10*s.*, and that there was no provision in the Income Tax Acts under which the fire insurance premium paid by the lessors could be allowed as a deduction from the rent reserved by the lease.

(1) The lease contained a covenant by the lessee to well and sufficiently repair, maintain, &c., the interior of the buildings with the fixtures and fittings (destruction or damage by fire excepted), but it is not thought necessary to set out the covenant in full. The lessors did not enter into any covenant to repair.

(2.) That under s. 66 of the Act, the tenant at a rack rent having produced to the assessor the lease or agreement in writing under which he immediately held the premises to be assessed, and it appearing by such lease or agreement that the same premises had been let within the period of seven preceding years, and no other consideration in money than the rent reserved being contained in such lease or agreement, the assessment must be made according to such rent, and not after deducting from such rent the amount of the fire insurance premiums paid and borne by the lessors.

(3.) That under s. 60 of the Act, Rule No. I. of Sched. A, the annual value must be understood to be the rent by the year at which the same were let at a rack rent, and that it was contrary to the intention of that section to allow as a deduction from the assessment the amount of the fire insurance premium borne and paid by the lessors.

(4.) That with regard to inhabited house duty similar considerations would apply, and the deduction could not be made, and in any event the assessment could not be reduced below the rent or value in the gross poor rate assessment.

(5.) That with regard to both Sched. A and inhabited house duty the provisions of the Valuation (Metropolis) Act, 1869, shewed that insurance could not be deducted in ascertaining the gross value.

The Commissioners were of opinion that in arriving at the annual value of the premises upon which the gross assessment should be based they were at liberty to take into consideration the special circumstances of the case, and particularly to place an annual value on the covenant by the lessors to insure and deduct such annual value from the annual rent, and they reduced the gross assessment to 887*l.* 10*s.* accordingly in each case.

The question for the opinion of the Court was whether in arriving at the annual value of the premises upon which the gross assessment was based the Commissioners were bound to accept the average rent reserved by the lease as conclusive evidence of such annual value, or whether in arriving at such annual value they were entitled to take into consideration the special

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circumstances of the case, and particularly to place an annual value on the covenant by the lessors to insure and to deduct such annual value from the average rent.

Sir W. S. Robson, A.-G. (*W. Finlay* with him), for the appellant. The respondent is not entitled to have the annual fire insurance premium upon the building, which is paid by the lessors, deducted before arriving at the annual value of the premises for the purposes of assessment either to income tax under Sched. A of the Income Tax Acts or to inhabited house duty under the House Tax Acts. By s. 7, sub-s. 3, of the Finance Act, 1904 (4 Edw. 7, c. 7), and s. 6, sub-s. 3, of the Finance Act, 1905 (5 Edw. 7, c. 4), which are in identical terms, "the annual value of any property, which has been adopted for the purpose either of income tax under Schedules A and B in the Income Tax Act, 1853, or of inhabited house duty, during the year ending on the fifth day of April," 1904 and 1905 respectively, "shall be taken as the annual value of such property for the same purpose during the next subsequent year." Those two enactments relate to the assessments now in question for the two years ending respectively on April 5, 1905, and April 5, 1906. Therefore the annual value of the premises which was adopted for the year ending April 5, 1904, must be taken to be the annual value for the years ending April 5, 1905 and 1906. That annual value is stated in the case to have been 1500*l.*, and that is the assessment appealed against. That annual value is conclusive. Generally speaking, every fifth year the Legislature omits the above provision, as, for instance, in s. 7 of the Finance Act, 1898 (61 & 62 Vict. c. 10), and in s. 5 of the Finance Act, 1903 (3 Edw. 7, c. 8), though it is not omitted in s. 7 of the Finance Act, 1908 (8 Edw. 7, c. 16). The object is to allow a new valuation to be made every fifth year, and to allow that valuation to stand for that and the four following years, thus introducing outside the metropolis a procedure which is fairly equivalent to the quinquennial valuation within the metropolis, where, by s. 45 of the Valuation (Metropolis) Act, 1869 (32 & 33 Vict. c. 67), the valuation list for the time being in force is to be conclusive evidence of the gross and

rateable values of hereditaments for the purposes of income tax and inhabited house duty. The Commissioners therefore had no power to go behind the assessment of 1500*l.* either for income tax or for inhabited house duty.

Next, the rent actually paid for the use of the premises, if it is a rack rent, is the annual value thereof for income tax purposes subject to any deductions allowed by the Income Tax Acts. Sched. A in s. 2 of the Income Tax Act, 1853, makes income tax payable on the "annual value" of the premises. By s. 5 income tax is to be assessed under the regulations and provisions of the Income Tax Act, 1842. By s. 60, Rule No. I., of the Act of 1842 the annual value is to be the rent by the year at which the premises are let at a rack rent. The rack rent here has been fixed by agreement within the period of seven years specified in the rule, and the Act does not authorize a deduction therefrom in respect of the fire insurance premium paid by the lessors. By s. 159 no deductions other than such as are expressly enumerated in the Act are to be allowed. The authorized deductions are all specified; for instance, in s. 61, Rules No. VI., allowances are to be made in the case of certain special premises, and in s. 63, Rules No. X., r. 1, the tenant's rates and taxes, if paid by the landlord, may be deducted from the rent. Sect. 64 lays down certain rules for assessing the annual value, and by s. 66 the assessment may be made upon production of the lease of the premises if let at a rack rent. If the tenant has covenanted to repair, the landlord receives a sum for rent and a covenant to keep his premises in repair, and the annual value of that covenant must be added to the rent, so as to make up the rack rent which is payable when the landlord covenants to repair. So also as regards the fire insurance premium, it is really incidental or ancillary to the covenant to repair. It is a specific mode of meeting the liability under the covenant to repair in the case of damage by fire. It cannot, therefore, be deducted in assessing the annual value of the premises. It is not one of the specific deductions allowed by the Act.

Lastly, as to inhabited house duty. By s. 1 of the House Tax Act, 1851, and the schedule thereto, the duty is payable according to the annual value of the dwelling-house; and s. 2

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refers back to and incorporates the rules for charging the duty set forth in Sched. B to the House Tax Act, 1808, so far as the same are applicable. The schedule to the Act of 1851 and r. 11 of the schedule to the Act of 1808 shew that annual value means the rent which the house is worth by the year, that is, the rack rent which the lessor can get for it. By r. 7, which is a provision in favour of the Crown, no dwelling-house is to be assessed at less than the rent or value at which it is assessed to the poor rate, but it may be assessed at more. Neither the assessment of the house to the poor rate nor the actual amount of rent paid is the test of annual value for inhabited house duty: *Walker* v. *Brisley*. (1) The rack rent is the test, and from that the premium on the fire insurance policy cannot be deducted.

Langdon, K.C. (*M. N. Drucquer* with him), for the respondent. Neither s. 7, sub-s. 3, of the Finance Act, 1904, nor s. 6, sub-s. 3, of the Finance Act, 1905, makes the annual value of the property adopted during the preceding year conclusive of the annual value of the property for the following year. An appeal against the assessment of the property for income tax or inhabited house duty is allowed by s. 57 of the Taxes Management Act, 1880 (43 & 44 Vict. c. 19), to the general Commissioners, whereas, if the contention of the Crown is correct, that appeal is impliedly taken away by the above provisions in the Finance Acts. The true meaning of those provisions is that the annual value which has been adopted for the preceding year shall be taken by the assessor as prima facie the annual value for the ensuing year, subject to that value being shewn to be wrong on appeal to the Commissioners. The object of the Finance Acts is to fix a prima facie value for a series of years upon which the assessor is to act, and then to leave the party who is aggrieved by that value being fixed to appeal to the Commissioners and to shew that it is wrong. By this means the labours of the assessor are considerably reduced, as he need not value the property each year, but the appeal is left open.

The Legislature, as is seen from s. 7, sub-s. 3, of the Finance Act, 1908, does not always omit this provision at the end of the quinquennial period, and it would be very unjust to make the

(1) [1900] 2 Q. B. 735.

annual value conclusive during a period of, it may be, ten years, without any new valuation, no matter how much the property may have fallen in value. A new lease of the property at a lower rent may have been granted on account of its fall in value, and yet, according to the Crown's contention, the annual value remains the same. If the Legislature had intended the word "taken" in s. 7, sub-s. 3, of the Finance Act, 1904, and in the similar provisions in the other Finance Acts to mean taken conclusively, it would have used words similar to those used in s. 45 of the Valuation (Metropolis) Act, 1869, where the valuation list is made "conclusive evidence" of the gross and rateable values of the hereditaments. There is no machinery in the Finance Acts like that in the Valuation (Metropolis) Act, 1869, for correcting the annual value of property due to a rise or fall in value during a quinquennial period. The Finance Acts therefore do not make the annual value adopted during the preceding year conclusive.

Next, with regard to the inhabited house duty, the term "annual value," or "full annual value," in the House Tax Acts, 1808 and 1851, means net annual value: *Dobbs* v. *Grand Junction Waterworks Co.* (1); *Rose* v. *Watson.* (2) Therefore the annual value must be arrived at after deducting the outgoings necessary to keep the premises in a condition to command the rent, which would include a deduction for repairs and fire insurance, as in s. 1 of the Parochial Assessments Act, 1836 (6 & 7 Will. 4, c. 96). Rule 7 in Sched. B to the House Tax Act, 1808, speaks of "rent or value," and accordingly "annual value" must mean the same as rent, namely, the net annual value. By rr. 8 and 9 the poor rate, if made on the full annual value, is to be taken as the basis of the assessment, and by rr. 10 and 11, if the poor rate is not made on the full annual value, or if there is no poor rate, then the rent, if the house is let at the full value, is to be the test, or if not so let, the rent which the house is worth to be let by the year is the test. The Commissioners have properly applied those rules, and, having taken into account the special circumstances of the case, they have fixed the assessment at 887*l.* 10*s.*, and this Court will not interfere.

(1) (1883) 9 App. Cas. 49. (2) [1894] 2 Q. B. 90.

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With regard to income tax, which only affects the lessors, the rules applicable to Sched. A in the Income Tax Act, 1842, make the rent the test of the annual value. To arrive at this it is necessary to see what is the actual rent which is received from the premises. By Rules No. X., r. 1, tenants' rates and taxes, if paid by the landlord, are to be deducted. The lease in the present case obviously does not state the true rent, because part of it is for the chattels; therefore s. 66 of the Income Tax Act, 1842, which provides that assessors may make their assessments of premises, which have been let at a rack rent within the preceding seven years, upon production of the lease according to the rent, does not apply. The "rent" which a person receives from property is the net sum which he makes out of the property after deducting all proper expenses necessary to keep the premises in a state to command the rent, that is to say, repairs and fire insurance. If the lessors could not get the specified rent unless they paid the fire insurance premium, the premium can be deducted. The statutory deductions do not affect the question; they only come in after the assessment has been arrived at. In *Stevens* v. *Bishop* (1) a deduction in respect of the expense of collection was allowed in estimating the annual value of tithe commutation rent-charge for income tax purposes, though such a deduction is not one of those specifically authorized. Here the premises are of a highly inflammable nature and could not be let except upon the terms that the lessors pay the fire insurance premium. That payment is a necessary expense of keeping the premises in a state to command the rent. The fire insurance premium was properly deducted.

Sir W. S. Robson, A.-G., in reply. Annual value in Sched. A of the Income Tax Acts means gross value. By s. 45 of the Valuation (Metropolis) Act, 1869, for the purposes of house duty and income tax, the annual value means the gross value, which by s. 4 means the rent which a tenant might be expected to give, the landlord undertaking to repair. The Legislature cannot have contemplated a different principle of assessment in the case of an imperial tax in the country from that in existence in the

(1) (1888) 20 Q. B. D. 442.

metropolis. Sect. 66 is general and covers this case. The lessor of a house may spend money on it, either yearly or otherwise, to enable him to get a large rent, but he cannot deduct that expenditure. So, too, in the House Tax Acts "annual value" is treated as equivalent to "rent," and the same principles apply.

As to the Finance Acts, the word "taken" means taken by every one who has to deal with the assessment, and not merely by the assessor. The Legislature has made the previous year's valuation conclusive on all, and has not chosen to allow a supplemental valuation to be made during the quinquennial period such as is allowed by s. 46 of the Valuation (Metropolis) Act, 1869.

CHANNELL J. A long and elaborate argument has been addressed to me upon several questions which may perhaps have to be decided some day; but for the purpose of this case I am unable to see how the respondent can overcome the difficulty in his way presented by s. 7, sub-s. 3, of the Finance Act, 1904, and s. 6, sub-s. 3, of the Finance Act, 1905, which are the statutes relating to the two years in question. Those two subsections, which are in similar language, provide that "the annual value of any property, which has been adopted for the purpose either of income tax under Schedules A and B in the Income Tax Act, 1853, or of inhabited house duty, during the year ending on the fifth day of April," 1904 and 1905, "shall be taken as the annual value of such property for the same purpose during the next subsequent year." I was at one time during the argument inclined, in order to meet difficulties which might arise, to think that the word "taken" must mean, as suggested on behalf of the respondent, provisionally or prima facie taken—that is to say, taken subject to its being shewn upon appeal that the annual value so taken is not the true annual value. In all probability most of the difficulties would be met by adopting that construction of the word, because if any real change had occurred in the value of the property itself, then an appeal would not be precluded, and the altered value could be settled on appeal. One of the difficulties which would be met

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by that construction would be the case, which was suggested during the course of the argument, of a value based on the rent under a lease which had just expired, and where a new lease had been granted at a different rent, the premises having fallen in value since the first lease was granted. Upon the whole, however, I do not think that because there may be cases of difficulty I should be justified in placing a rather strained interpretation upon the word "taken." I think that the Legislature intended to adopt for the country outside the metropolis, for the purposes of income tax and house duty, something equivalent to the quinquennial valuation which prevails in the metropolis, and they did it by passing those annual Acts making the annual value adopted during the previous year conclusive for the following year, while, as it seems, about every five years that special provision is omitted, and the question of value is left open. By that means something analogous to the quinquennial valuation of the metropolis is given. The Legislature, however, did not adopt all of the provisions as to valuation which are applicable to the metropolis, because they have not inserted a provision, as they did in the Valuation (Metropolis) Act, 1869, to meet the case of an alteration of value occurring during the quinquennial period.

This being my view of this provision in the Finance Acts, it becomes unnecessary to decide the other points which have been raised. If I had to decide them I should like to take further time to look into the various provisions of the Acts, because they are somewhat elaborate and require careful consideration; but as they have been fully argued, I think I ought to say that the inclination of my opinion is that the provisions of the Income Tax Acts shew that the contention of the respondent is wrong, and that the fire insurance premium should not have been dealt with by the Commissioners in the way in which it was. So also as to the inhabited house duty, it seems to me that the reasoning of the judgments in *Walker* v. *Brisley* (1) is against the view of the Commissioners. Therefore upon both these points the inclination of my mind is against the view taken by the Commissioners, but, as I have intimated, if I had to decide these points I should desire to take time to look carefully through the

(1) [1900] 2 Q. B. 735.

provisions of the Acts dealing with the matter. My decision is that the two sections of the Finance Acts of 1904 and 1905 are conclusive of this case and preclude these two questions from arising. The appeal will therefore be allowed.

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Appeal allowed.

Solicitor for appellant: *Solicitor of Inland Revenue.*
Solicitor for respondent: *J. Moverley Sharp.*

W. F. B.

[IN THE COURT OF APPEAL.]

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1909

Feb. 13,

STEAMSHIP NEW ORLEANS COMPANY *v.* LONDON AND PROVINCIAL MARINE AND GENERAL INSURANCE COMPANY.

Practice—Ship—Constructive Total Loss—Subject-matter of Action—Order to bring within Jurisdiction—Preservation—Inspection—Order L., *r.* 3.

In an action by shipowners claiming under a policy of marine insurance in respect of an alleged constructive total loss of their ship, the defendants applied at chambers for an order that the ship, which was lying unrepaired in Singapore harbour, be brought to England before the trial of the action, at the defendants' risk and expense, on the ground that it was necessary for the preservation and inspection of the ship:—

Held, that the Court had power, under Order L., r. 3, to make the order, and that in the circumstances it was right that the order should be made.

APPEAL from Bray J. at chambers.

In May, 1908, the steamship *New Orleans*, of which the plaintiffs were the owners, whilst on a voyage from Ocean Island to Hamburg laden with a cargo of phosphate, stranded at Pula Laut, off Borneo, and in consequence sustained serious injuries. Notice of abandonment was given to the underwriters. Salvage operations were undertaken on behalf of the underwriters, and on August 10 the vessel was floated. She proceeded to Singapore in tow and arrived there on August 31.

The *New Orleans* was insured as regards hull and machinery by policies for 28,000*l.* against all risks, one policy for 1000*l.*

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having been effected with the defendants, and there were in addition insurances to the amount of 18,000*l.* on disbursements against total loss only, and insurances on freight. The cargo was insured for 9650*l.*

The plaintiffs alleged that by reason of the stranding the *New Orleans* became a constructive total loss, and on October 30, 1908, they commenced this action against the defendants, claiming 1000*l.* under their policy. The action was transferred to the commercial list, and the defendants applied to Bray J. at chambers for an order "that the steamship *New Orleans* should be brought to the United Kingdom by the plaintiffs and the cargo delivered to her consignees, or alternatively that the Salvage Association be authorised without prejudice to all questions between the plaintiffs and defendants and other underwriters on ship and freight to bring the vessel to the United Kingdom with the cargo on board at their risk and expense, and deliver the cargo to the consignees, the Salvage Association receiving the freight payable on delivery of the cargo and paying all expenses of the voyage and accounting to the proper parties for the balance of freight (if any)."

It appeared from affidavits filed by the defendants in support of the application that on the arrival of the *New Orleans* at Singapore she was placed in dry dock and surveyed for repairs. Certain temporary repairs were executed at a cost of 1700*l.*, which were sufficient to enable her to lie in harbour, where she was at the date of the application, incurring expense for harbour dues and, it was alleged, deteriorating day by day. The cost of executing permanent repairs to the vessel at Singapore, according to a specification prepared after the survey of the vessel in dry dock, would be 26,100*l.*, and some of the necessary materials for the repairs would have to be specially sent out to Singapore from England. For the sum of 2300*l.* such temporary repairs could have been done as would enable the vessel to complete her voyage to Europe; and the vessel could be repaired in England to the requirements of the surveyor to Lloyd's Register for 13,000*l.*, and in accordance with the provisions of the specification obtained at Singapore for 15,000*l.*

In an affidavit filed on behalf of the plaintiffs it was alleged

that it would cost at least 20,000*l.* to repair the vessel in this country, and that the cost of temporary repairs at Singapore, sufficient to obtain a certificate of seaworthiness, would be not 2300*l.*, but at least 4500*l.*

Bray J., being of opinion that he had no jurisdiction under Order L., r. 3 (1), to make an order in the terms of the defendants' summons, dismissed the application.

Scrutton, K.C., and *F. D. Mackinnon*, for the defendants. Under Order L., r. 3, the Court has power to order that this vessel shall be brought to England before the trial, on the ground that it is necessary for the preservation and also for the inspection of the property which is the subject-matter of the action. The evidence shews that if the vessel remains unrepaired at Singapore she will deteriorate day by day, thus increasing the ultimate cost of repair; and the evidence of English repairers who will have been able to see the vessel after her arrival here will be the best evidence on the question whether a prudent uninsured owner would repair her. The making of the order cannot in any way prejudice the plaintiffs, for the defendants are willing to bear the expense and take the risk of the voyage home. *Chaplin* v. *Puttick* (2) and *Strelley* v. *Pearson* (3) are authorities which shew that the Court has, in the circumstances of this case, jurisdiction to make the order asked for by the defendants.

A. A. Roche, for the plaintiffs. When this application was before the judge in chambers, the case put forward on behalf of the defendants was that it was necessary for the preservation of the vessel that she should be brought to this country, but as it is

(1) Order. L., r. 3: "It shall be lawful for the Court or a judge, upon the application of any party to a cause or matter, and upon such terms as may be just, to make any order for the detention, preservation, or inspection of any property or thing, being the subject of such cause or matter, or as to which any question may arise therein, and for all or any of the purposes aforesaid, to authorise any persons to enter upon or into any land or building in the possession of any party to such cause or matter, and for all or any of the purposes aforesaid to authorise any samples to be taken, or any observation to be made or experiment to be tried, which may be necessary or expedient for the purpose of obtaining full information or evidence."

(2) [1898] 2 Q. B. 160.

(3) (1880) 15 Ch. D. 113.

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not suggested that the vessel is in fact to be repaired here, and as there is no evidence that she will be better preserved here than at Singapore, the judge rightly held that it was not a case in which the order asked for could be made under Order L., r. 3. It is now for the first time suggested that the ship ought to be brought home for the purpose of inspection, but there has already been an inspection by the defendants' surveyor at Singapore, and no further inspection is required. If the order is made the plaintiffs may be seriously prejudiced at the trial, for if the ship makes the homeward voyage without mishap, that fact will inevitably tell against the plaintiffs at the trial, though it will be quite irrelevant to the real issue in the case, namely, whether a prudent uninsured owner would have repaired the ship at Singapore.

FARWELL L.J. In this case Bray J. declined to make any order on the ground that he had no jurisdiction to do so. I am of opinion that the learned judge took too narrow a view of the meaning and effect of Order L., r. 3. I think that the two cases which have been cited shew that in the circumstances of this case the Court has jurisdiction under that rule to make an order for the bringing of this vessel to this country, on the ground that that is desirable for the "preservation" and also for the "inspection" of the ship. The defendants, who are asking for the order, are willing to take the whole risk of bringing the ship to this country, and it appears to me that it will be to the advantage of all parties that that should be done. I have, indeed, been somewhat puzzled to know why it is that the plaintiffs object to it, but I gather that their main reason for objecting is their fear of the effect which may be produced on their case at the trial by the evidence of the fact that it has been possible to bring the ship home. To my mind that is a reason in favour of bringing the ship home, rather than against doing so, if, as is the case, the other side are willing to take the risk. It may prove an application of the maxim solvitur ambulando. I further think that if the Court has jurisdiction to send a chattel out of this country to South Africa, for the purpose of trial here and inspection there, as was done in *Chaplin* v. *Puttick* (1), there is

(1) [1898] 2 Q. B. 160.

a fortiori jurisdiction to order a chattel, namely, a ship, to be brought to this country for inspection when the case is to be tried here.

On these grounds I am of opinion that the order ought to be made, but the exact terms of the order will need a little consideration, and I think that the best plan will be for the matter to go back to Bray J. for him to settle the exact form of the order.

KENNEDY L.J. I agree, and I only wish to add this to the observations that Farwell L.J. has made. There seems to be in the minds of those who have instructed Mr. Roche to oppose this application some fear that the plaintiffs will be prejudiced if the ship is brought to this country before the trial, because it will be said by the other side that that shews that the vessel can be navigated after repairs, and that she was, therefore, not a constructive total loss; and that the fact of her safe arrival in Europe will probably prevent the jury from properly considering the question, which they ought to consider, namely, whether a prudent uninsured owner would have repaired the ship and have taken the risk of bringing the ship to Europe. In my opinion the order which the defendants ask for is an order for a special purpose, to be made upon special terms at the defendants' risk, and I do not think that there is the least danger of any unfairness or prejudice to the plaintiffs arising from the making of the order; on the contrary, I think there will rather be the advantage to all parties, in addition to being enabled to examine the vessel here, of knowing by experiment what the ship can in fact do, and so testing practically the expert evidence which is usually given in these cases.

Appeal allowed. (1)

Solicitors for plaintiffs: *Downing & Handcock.*
Solicitors for defendants: *Waltons & Co.*

(1) The action was subsequently settled, and it therefore became unnecessary to proceed with the drawing up of the order.

F. O. R.

1909
Feb. 19;
March 5.

REDERIACTIESELSKABET "SUPERIOR" *v.* DEWAR & WEBB.

Ship—Charterparty—Lien—Demurrage, payable day by day—Charges—Dead Freight.

A charterparty provided that demurrage should be paid, at a specified rate, "day by day as falling due," and that the owner should have a lien upon the cargo for "all freight, demurrage and all other charges whatsoever":—

Held, that the fact that demurrage was payable day by day as falling due did not deprive the shipowner of his lien for demurrage.

Gardner v. *Trechmann*, (1884) 15 Q. B. D. 154, and *Pederson* v. *Lotinga*, (1857) 28 L. T. (O.S.) 267, distinguished.

Held, also, that the word "charges" did not include dead freight.

ACTION in the commercial list tried by Bray J. without a jury.

The plaintiffs were the owners of the barque *Superior*. By a charterparty dated February 27, 1907, Willenz & Co. chartered the *Superior* from the plaintiffs to carry a full and complete cargo of wheat $\frac{\text{and}}{\text{or}}$ linseed from Buenos Aires to a safe port in the United Kingdom and there deliver the cargo as per bills of lading on being paid freight as follows: 15*s.* 6*d.* per ton of 2240 lbs.

The following were the material clauses of the charterparty:—

"5. The freight shall be paid as follows, viz.:—sufficient cash for ship's use (if required by the master) to be supplied on account of freight at port of loading not exceeding one third part subject to $7\frac{1}{2}$ per cent. commission to cover all charges, and the balance of freight on the right and true delivery of the cargo in cash without discount."

"9. Charterers have the option of shipping other lawful merchandise, in which case freight to be paid on vessel's dead weight capacity for wheat or maize in bags on this voyage at the rates above agreed on for heavy grain; but ship not to earn more freight than she would if loaded with a full cargo of wheat $\frac{\text{and}}{\text{or}}$ maize in bags. All extra expenses for loading such merchandise over heavy grain to be paid by charterers."

"12. Thirty-five running days (Sundays holidays and strikes excepted) to be allowed the said charterers (if the ship be not

sooner despatched) for loading, and the discharge to be effected according to the custom of the port. Lay days to commence the day after the master has given written notice that his vessel is discharged and ready to receive or discharge the cargo."

"13. Should the vessel be detained by charterers or their agents over and above the said laying days, demurrage shall be paid to the said master at the rate of fourpence per net register ton for each and every day's detention afterwards, to be paid day by day as falling due."

"15. Wharfage dues, if any, for loading to be for account of the charterers."

"19. The owner or master of the vessel shall have an absolute lien and charge upon the cargo and goods laden on board for the recovery and payment of all freight, demurrage and all other charges whatsoever."

"23. Five per cent. brokerage is due by the ship on the above freight, dead freight and demurrage, ship lost or not lost, cancelled or not cancelled, on signing this charterparty to Erfjord & Co., and in the event of cancelment consignment to remain in their hands or their agents'."

Written notice that the *Superior* was ready to load was duly given on April 23, 1907, and the lay days commenced to run on April 24. Allowing for Sundays and holidays, the thirty-five lay days expired on June 7.

On July 6, 1907, 617 tons of cargo having then been shipped by the charterers, and space for 1263 tons remaining, the charterers gave notice to the master that they did not intend to load any further cargo, and they requested him to proceed with the cargo then on board. The master acted on that request; no more cargo was loaded, and the ship sailed on July 15.

The *Superior* arrived at London on or about September 9, 1907, and the plaintiffs exercised their lien on cargo for 791*l.* due for thirty-eight days' demurrage at the port of loading, for 915*l.* for dead freight, and for 255*l.* paid by the plaintiffs at Buenos Aires for and at the request of the charterers.

The defendants were the indorsees of the bills of lading, which incorporated the provisions of the charterparty relating to the

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shipowners' lien. After the arrival of the ship at London the defendants agreed with the plaintiffs that, in consideration of the plaintiffs releasing the cargo from the lien, the defendants would be personally responsible for and would pay to the plaintiffs any sum, not exceeding the amount claimed by the plaintiffs as above, for which it might be proved that the plaintiffs were legally entitled to exercise a lien upon the cargo.

The plaintiffs claimed in this action a declaration that they were entitled to exercise a lien for the said three sums, and payment thereof by the defendants.

The defendants alleged that there was a strike at Buenos Aires which prevented any loading of the *Superior* between April 25 and May 14, but the judge found as a fact that there was no strike.

Bailhache, *K.C.*, and *A. A. Roche*, for the plaintiffs.

Scrutton, *K.C.*, and *Leck*, for the defendants. The charterparty provides by clause 13 that demurrage is to be paid day by day as it falls due, and, therefore, a right of action accrued to the plaintiffs in respect of each day's demurrage. It follows that the plaintiffs had no lien for demurrage, for there can be no lien for that which can be sued for at once. In *Gardner* v. *Trechmann* (1) Lindley L.J. said "There can be no lien for what is contracted to be paid in advance," and in *Pederson* v. *Lotinga* (2) it was held that where demurrage was payable day by day there was no lien. The provision in the charterparty as to lien must therefore be read as applying to demurrage at the port of discharge only. In any case the plaintiffs are claiming more for demurrage than they are entitled to. Notice to proceed was given to the master on July 6, and demurrage is not payable for the subsequent delay of the ship in obtaining clearance. The plaintiffs have no lien for dead freight, for none is given by the charterparty. The word "charges" in clause 13 only includes sums payable under the charterparty, as, for example, wharfage dues.

Bailhache, *K.C.*, in reply. The charterparty in express terms gives the shipowner a lien for demurrage. The only point really

(1) 15 Q. B. D. 154. (2) 28 L. T. (O.S.) 267.

decided in *Gardner* v. *Trechmann* (1) was that, as the bill of lading did not incorporate the provisions of the charterparty as to payment of freight, the shipowner had not as against the bill of lading holder a lien for the excess of the charterparty freight over the bill of lading freight. The case is no authority for the general proposition that there can be no lien for a sum payable in advance. The observation of Lindley L.J. was unnecessary for the decision. The decision in *Pederson* v. *Lotinga* (2) turned on the particular provision of the charterparty then in question, which contained different stipulations with regard to demurrage at the port of loading and at the port of discharge, and, moreover, the charterparty contained a cesser clause, which this charterparty does not. With regard to the dead freight, clause 23 of the charterparty refers to the "above dead freight," but there is no other express mention of it in the charterparty, and the inference is that it was intended to be covered by the word "charges" in clause 19. The word "charges" is used in that sense in s. 494 of the Merchant Shipping Act, 1894. [He referred to *McLean* v. *Fleming* (3) and *Gray* v. *Carr*. (4)]

Cur. adv. vult.

March 5. BRAY J. read the following judgment:—In this case the plaintiffs, the owners of the ship *Superior*, claimed against the defendants, the holders of the bill of lading, the payment of certain sums for dead freight, demurrage, and charges, for which they alleged they had a lien. When the claim was made, the goods were released on the defendants giving a bank guarantee, and the question I have to determine is whether the plaintiffs had a lien, and, if so, for what sums, in respect of any of the three matters. The charterparty is dated February 27, 1907, and Messrs. Willenz & Co. were the charterers. The bill of lading was dated June 14, 1907, and admittedly contained words sufficiently wide to incorporate the provisions of the charterparty with reference to lien. I have, therefore, to look to the charterparty to see what those provisions were. No question

(1) 15 Q. B. D. 154.
(2) 28 L. T. (O.S.) 267.
(3) (1871) L. R. 2 H. L. Sc. 128.
(4) (1871) L. R. 6 Q. B. 522.

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arises as to freight. That has been paid. The first claim is for dead freight. It is admitted that the ship was not fully loaded at the port of loading, and that the plaintiffs have a good claim against the charterers for a large sum for damages in this respect. The defendants contended that no lien was given by the charterparty for dead freight at all. This depends on the true construction of clause 19. [The learned judge read the clause.] It is to be observed that dead freight is not mentioned in this clause, a very notable fact, especially having regard to the fact that it is expressly mentioned in clause 23 of the charter. But it is said that it is included under "all charges whatsoever." Now the omission of the words "dead freight," in my opinion, raises a very strong presumption that it was not intended that there should be a lien for that, and I ought not to read "charges" as including dead freight, at all events unless that would be the ordinary and natural meaning of the word "charges." I do not think it is the ordinary meaning. The word "charges" does not, in my opinion, in its ordinary signification mean a claim for damages for breach of contract. Primarily I think it means sums which the master or the ship has had to pay; it does not mean sums which the ship is entitled to receive. Primarily, also, I think it means liquidated, and not unliquidated, sums. The word "charges" appears in clause 5, and it certainly does not there mean damages which the ship would be entitled to recover from the charterer. It is unnecessary to say what the word "charges" may mean in the Merchant Shipping Act. Used where it is in this charterparty, I am clearly of opinion that it does not include dead freight. The plaintiffs' claim for dead freight therefore fails.

The next claim is for demurrage at the port of loading. That depends again on the true construction of clause 19, and I will consider the question first apart from any authorities. That a lien is intended to be given for some demurrage is clear. Clause 13 provides for the payment of demurrage. If that provides for demurrage at the port of loading only, I should be compelled to come to the conclusion that a lien was given for that, but I think it provides for payment of demurrage at the port of discharge as well. It refers to detention over and above "the

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said laying days," and I think clause 12 provides for lay days at the port of discharge as well as lay days at the port of loading. Demurrage, therefore, in clause 13 means demurrage at either or both ports. There is no separate clause for demurrage at the port of discharge and another for demurrage at the port of loading. Now clause 19 says "all freight, demurrage," i.e., "all demurrage," and therefore, prima facie, I think it includes demurrage at either port. Is there anything to shew that demurrage at the port of loading is not included? It is said that there is, because it has to be paid to the master "day by day as falling due." This, it is to be observed, refers to demurrage at each port. The argument, as I understand it, is that as it has to be paid to the captain day by day it can be sued for at the port of loading, and, therefore, no lien is necessary, but in practice it is most unusual for it to be paid before the ship sails, and there seems no good reason why the ship should not have the security of a lien in the event of its not being paid at the port of loading. It seems to me that, the intention being as expressed in clause 19, that the ship should have a lien for all demurrage, and no distinction being made in the charterparty between demurrage at the port of loading and demurrage at the port of discharge, I have no right to limit the lien or to give the words "all demurrage" anything else than their ordinary signification.

But two cases were cited which, it was said, oblige me to confine the lien for demurrage to demurrage at the port of discharge, and as they required consideration I reserved my judgment. The first of them is *Pederson* v. *Lotinga*. (1) In that case one of the questions was whether the cesser of liability clause applied to demurrage at the port of loading which had accrued before the ship was loaded. It was held that the liability of the agent, having attached for that demurrage, was not absolved by the clause which meant that the future liability only of the agent should cease. It is impossible to say that that case is an authority which binds me in the present case, where there is no cesser of liability clause at all. But it is said that one of the learned judges, Crompton J., expressed an opinion

(1) 28 L. T. (O.S.) 267.

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which governs the present case. Now the charterparty is not set out in full, but it appears that there were two separate clauses relating to demurrage, one with reference to loading in the Tyne, the other with reference to the unloading at Copenhagen, and Crompton J., after reading the former, which provided for demurrage being payable day by day, said: "That is a very different clause from the demurrage clause at the port of discharge. It may be that the captain, being detained at the Tyne, wants his demurrage day by day. If it is to be paid day by day in the Tyne, the captain has no lien on anything. The protecting clause applies only to the lien for the demurrage out." But that, in my opinion, is not intended as a statement of any general rule of law; it is merely a statement of the particular meaning of the clause, which was in these words: "Fourteen days to be allowed for loading in the Tyne, or the captain to receive 5*l.* per day for demurrage, day by day."

I can quite understand that in that case, as soon as the Court had held that liability meant future liability only, it might be reasonable to say that the lien should be confined to the demurrage for which the consignee would become liable in the future only. It is to be observed that none of the other three learned judges gives any opinion as to what demurrage was covered by the lien. It would be most dangerous to treat an expression of opinion with reference to the construction of a particular clause in a particular charterparty as laying down a proposition of law applicable to all charterparties where the demurrage was payable day by day, particularly when it is more than likely that the report is only a condensed report of the judgments given. Of course at most, it would be only a dictum of one judge.

The other case is *Gardner* v. *Trechmann*. (1) In that case Lord Lindley in his judgment said (2), "I am also of opinion that there can be no lien for what is contracted to be paid in advance." This is relied on as stating a general proposition of law that there can be no lien for that which has to be paid in advance. When the case is carefully looked at, I do not think Lord Lindley meant to lay down any general proposition of law. Lord Esher

(1) 15 Q. B. D. 154. (2) 15 Q. B. D. at p. 159.

had decided the case on two grounds, one that as between the charterer and the shipowner there was no lien for the excess freight, and the other that, if it were otherwise, that provision could not be read into the bill of lading. Lord Lindley in the earlier part of his judgment decides the case upon the ground that, the bill of lading having expressly named the rate of freight, a clause making the holder responsible for the whole charterparty freight would be inconsistent, and that only those conditions were incorporated in the bill of lading which were consistent with the contract contained in it. He then proceeds to add the words which I have quoted. I think he merely meant by that that he agreed with Lord Esher on the other point also. Looking, then, at Lord Esher's judgment, is he laying down a general proposition of law, or merely construing that particular charterparty? In my opinion he was only construing that particular charterparty. That being so, the terms of it being quite different from those of the present case, it is no authority at all on the point which I have to decide.

I have searched to see whether there is any authority for the proposition that you cannot have a lien for a sum payable in advance or due before the time when the lien is to attach. I can find none. It is clear that under a general lien a carrier can have a lien not only in respect of freight not then earned, but for freight which has been earned and is overdue. A general lien can be given by agreement. Therefore by agreement you can have a lien for moneys overdue. It is only a question whether the particular agreement gives it or not, and I have expressed the opinion that in this case the words are wide enough to give a lien for demurrage at the port of loading, although it was payable day by day there.

There was a dispute as to the amount of demurrage. [The learned judge dealt with the evidence and found as a fact that no strike existed which prevented the loading.] The defendants, however, also contended that I ought to disallow all days after July 6, when the charterers stated that they would provide no further cargo. Up to July 10, however, the crew were employed in shifting the cargo, which was clearly a necessary work. Then the clearance had to be obtained. Apparently more than the

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Bray J.

usual time was occupied in doing this. The captain stated that he left the matter in the hands of his agents and did not admit that there was any undue delay. The correspondence of the defendants' agents shews no complaint of delay, and there was no reason why the captain should not have got away as soon as he could. I think, therefore, I must include all days up to July 14. I cannot include July 15, the day on which the ship sailed. I allow thirty-seven days demurrage.

The last claim is for charges. It is not necessary for me to give an exhaustive definition of the word "charges." I think they must be sums paid in connection with the performance of duties which the ship had to perform in loading the cargo, and, at the same time, that they are not necessarily confined to charges specifically mentioned in the charterparty. I do not think they include claims for damages. [The learned judge went through the account and allowed payments for towage, harbour pilot, wharfage, and permits for loading berths.]

Judgment for plaintiffs.

Solicitors for plaintiffs: *Botterell & Roche.*
Solicitors for defendants: *Thomas Cooper & Co.*

F. O. R.

[IN THE COURT OF APPEAL.]

C. A.
1909
March 23.

HUGHES *v.* THE COED TALON COLLIERY COMPANY, LIMITED.

Employer and Workman—Compensation—Notice of Accident—Written Notice necessary—Failure to give Notice—Prejudice to Employer—Onus of Proof—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 2.

The notice of the accident which is to be given to the employer under s. 2, sub-s. 1, of the Workmen's Compensation Act, 1906, must be in writing. Under proviso (*a*) of sub-s. 1 the onus lies on the workman of shewing that his employer has not been "prejudiced in his defence by the want, defect or inaccuracy" of any such notice.

Appeal against the award of the judge of the county court of Flint upon a claim for compensation under the Workmen's Compensation Act, 1906.

The only question raised by this appeal which calls for any detailed report was whether notice of the alleged accident had been given to the respondents in accordance with the requirements of s. 2 of the Act of 1906. The facts so far as material were as follows:

The applicant, a collier in the employ of the respondents, alleged that he met with an accident while working in the colliery in January, 1908; two days after the accident he verbally reported it to the under-manager of the colliery and a fireman.

On May 12, a written notice of the accident was served on the respondents by the North Wales Miners' Association on behalf of the applicant in which it was stated that the accident took place on January 12, when the applicant injured his shoulder by coal falling upon him.

On May 25, a second notice was served on the respondents by the same association in which the accident was stated to have occurred "on or about" January 23, when the applicant was injured by a fall of coal.

On June 5, written notice of the accident was served on the respondents by the applicant's solicitor in which the accident

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was stated to have happened on January 9, when the applicant "slipped between sprags and injured his left shoulder."

On June 22, the applicant commenced these proceedings for arbitration under the Workmen's Compensation Act, 1906, and in his particulars stated that the accident happened on January 9, and that the statutory notice of the accident was served on June 5; no reasons were given for not having served the notice earlier.

The county court judge awarded compensation and found as a fact that the accident happened on January 23.

The respondents appealed, one of the grounds of appeal being that no notice of the accident had been given in accordance with the Act.

The appeal was heard on March 23, 1909.

Simon, K.C., and *Cuthbert Smith*, for the appellants. A verbal statement to two of the officials of the colliery is not sufficient notice; the notice should be in writing. Sect. 2, sub-s. 1, of the Act of 1906 requires notice to be given "as soon as practicable after the happening thereof"; this was not done. The first written notice was in May, five months after the accident, and no excuse was offered or explanation given for the delay. The written notices do not agree as to the date or the cause of the accident. For five months the employers were in ignorance of this alleged accident and are consequently at a great disadvantage in investigating the claim. The onus under the proviso (*a*) of this sub-section lies on the workman to shew that his employer has not been "prejudiced in his defence" by the failure of the applicant to give due notice of the accident: *Shearer* v. *Miller & Sons* (1); *McLean* v. *Carse & Holmes*. (2)

The absence of a proper written notice or evidence shewing that the owner has not been prejudiced is fatal to this claim.

C. A. Russell, K.C., and *Owen Roberts*, for the workman. Sect. 2, sub-s. 1, does not in terms say that the notice must be in writing; the proviso (*a*) would seem to shew that an informal notice will be sufficient, so long as the employers are not prejudiced in their defence by any defect or inaccuracy. The

(1) (1899) 2 F. 114. (2) (1899) 1 F. 878.

evidence here shews that the applicant did report the accident to the under-manager and a fireman two days after it happened, and explained his absence from work as due to the accident. The county court judge has found this as a fact and accepted the applicant's statement on this point. It is not necessary for the workman to plead in his particulars that the employer has not been prejudiced.

[COZENS-HARDY M.R. It is not necessary for us to go into that.]

The findings of fact do not shew that the employers have been prejudiced by not having notice earlier.

COZENS-HARDY M.R. This is an appeal from an award of a county court judge, and it raises several points, only one of which it is necessary for us to deal with here.

The applicant's case is of this nature: he says by his application, which is dated June 22, 1908, that he met with an accident on January 9, 1908. He says he was getting coal when a fall of coal occurred and there was injury to his left shoulder. He then pleads total incapacity for a certain time, and according to the statutory form in his particulars, No. 11, I find, "Date of service of statutory notice of accident on respondent and whether given before workman voluntarily left the employment in which he was injured"; he answers, "June 5, 1908." That is to say, according to his own particulars in his application, the accident is said to have happened on January 9, and he did not give notice until June 5. The respondents, the employers, by their answer distinctly raised the point that no notice required by the statute had been given. It was then argued that it was proved in evidence, which the learned county court judge believed, that the fact of the alleged accident was stated to a fireman and, I believe, to a sub-manager or manager a few days afterwards. Nothing more than that is even alleged, and under those circumstances what we have to consider is the true meaning and legal effect of s. 2 of the Workmen's Compensation Act, 1906. That section provides, in sub-s. 1, that "Proceedings for the recovery under this Act of compensation for an injury shall not be maintainable unless notice of the

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accident has been given as soon as practicable after the happening thereof and before the workman has voluntarily left the employment in which he was injured." Of course it was quite plain—too plain for argument—that the notice of the alleged accident on January 9 was not given "as soon as practicable," as it was not given until June 5; and that leaves one to consider first of all, Does the notice of accident required by the statute mean a notice in writing, and even if it does, are there any words in the Act which justify us in relieving the workman of the obligation to give a written notice under special circumstances?

Now the language of s. 2 of this Act was for all practical purposes identical—I think it is really identical—with the language of s. 4 of the Employers' Liability Act, 1880. I do not read the sections because they are identical, and the Court of Appeal in *Keen* v. *Millwall Dock Co.* (1) held that a notice of accident, or notice of injury as it was there called, must be in writing. I should have come, I think, to the same conclusion from the mere consideration of the language of s. 2 itself; for although it is quite true that under sub-s. 1 of s. 2 it is not expressly said "notice in writing of the accident," it seems to me to be reasonably plain, when you look at sub-ss. 2, 3, and 4, that the notice must be in writing. However, the authority I have just mentioned, which is binding upon us, decides that; and, as far as I can trust my memory, in the cases under the Workmen's Compensation Act which have been before me, the view has been uniformly held in this Court that s. 2 of the Workmen's Compensation Act, 1906, does require notice in writing to be given of the accident.

But then it is quite true that although the verbal notice given to these two employees shortly after the alleged accident is not a good notice within the statute, and indeed the only written notice that is alleged is that on June 5, yet it is said that the case comes within the proviso (*a*) of sub-s. 1, which says—I omit the irrelevant words—"Provided always that the want of such notice . . . . shall not be a bar to the maintenance of such proceedings if it is found in the proceedings that the employer is not or would not,

(1) (1882) 8 Q. B. D. 482.

if a notice were given and the hearing postponed, be prejudiced in his defence by the want . . . . or that such want . . . . was occasioned by mistake, absence from the United Kingdom or other reasonable cause." In my view there is not a particle of evidence which justified the learned county court judge in saying, or which enables us to say, that the employers were not prejudiced by the absence of written notice of this accident within a reasonable time after the accident occurred; and I never saw a plainer case for holding that the employers were prejudiced.

The applicant in this case saw his own doctor immediately after the alleged accident, and he did not elect to call him. The learned judge, who was not apparently quite satisfied with that, himself called that doctor after the respondents' case was closed, and this is what he says: "Applicant came to my surgery about the end of January complaining of rheumatism. I had on several occasions treated him for rheumatism. He said nothing of accident, but I noticed an abrasion on side of neck, so slight I made no note of it. I treated him for rheumatism for some time. After that he came in occasionally to see me. Then broke down altogether. He never mentioned accident to me at any time." After that, the applicant went to the Chester Infirmary, where he was treated, not for the accident, but for rheumatism. In those circumstances I think it would be doing a gross wrong to the employers to say that they ought to be made liable in respect of an alleged accident (the occurrence of which is open to very great doubt on other grounds) which they have not now and cannot possibly have the same means of investigating and dealing with as if they had been informed in January, the date of the alleged accident, of what had taken place. When I find that the doctor attending the applicant at that time was never told there was any accident at all, and when I find that some five months after a certificate was obtained, under very peculiar circumstances indeed, from another doctor who had not seen the applicant before, to the effect that the injury which he was suffering from was consistent with an accident, I cannot come to any other conclusion than that this is a case in which the workman has failed to give the proper

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notice, and has also failed to establish that, the onus of which lies upon him, the employer has not been prejudiced by the failure to give due notice of the date and nature of the accident.

That being the view I take, it is not necessary to go into the other part of the case, although even if I had taken a different view about it I should have been very anxious to hear what Mr. Russell had to say.

I think that this appeal should be allowed.

FLETCHER MOULTON L.J. I am of the same opinion. The applicant proceeded at the trial on the basis that due notice had been given, and he failed to prove that such notice had in fact been given. He was then entitled to fall back upon this issue: Supposing a notice was given there and then at the trial and the hearing postponed, would the employers have been prejudiced in their defence by that being done? If he could have succeeded on that issue it would have sufficed. But he failed on this issue also, for I cannot imagine a clearer case that a notice given at the trial followed by the postponement of the hearing would not have been an efficient substitute for the proper notice which he ought to have given.

FARWELL L.J. I am of the same opinion. The learned county court judge has found that the defendants have not been prejudiced by the want of written notice. Not only is there no evidence to support such a finding, but, in my judgment, the evidence is overwhelmingly the other way, and it is quite plain that the employers have been grievously prejudiced. If the sort of casual statement to a superior workman which has been suggested in the evidence in this case is to be taken as sufficient notice of an accident, then s. 2, requiring notice to be given to the employer in writing, might just as well have been struck out of the Act altogether. The Act says beyond any doubt that a notice should be given in a reasonable time so as to enable the employer to deal with and investigate the claim, which may in some cases—I do not say whether it is so in this

case or not, because it is not necessary to determine it—be a bogus one.

Appeal allowed.

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HUGHES v. COED TALON COLLIERY COMPANY, LIMITED.

Solicitors: *Hurd & Son, for Chapman & Brooks, Manchester; J. Dowes Powell, Wrexham.*

W. C. D.

[IN THE COURT OF APPEAL.]

1908 *July* 24.

ROWLAND *v.* WRIGHT.

Employer and Workman—Compensation—Accident arising out of and in the Course of Employment—Cat Bite—Workmen's Compensation Act, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

A teamster in the course of his employment was eating his dinner in his employer's stable, and while doing so was bitten by a cat belonging to the stable and was seriously injured. Upon an application for compensation under the Workmen's Compensation Act, 1906:—

Held, that the accident arose out of and in the course of his employment.

APPEAL by the employer against an award of the county court judge of St. Helens, Lancashire, sitting as arbitrator under the Workmen's Compensation Act, 1906.

The applicant Rowland was a teamster in the employment of the appellant. On January 2, 1908, he took his horses to the stable for their midday meal, and he then proceeded to eat his own dinner in the stable. While he was eating his dinner a stable cat sprang at him and bit him. He was not teasing the cat in any way, nor was he feeding it on that occasion, although he had thrown bits to the cat on other occasions. The cat was not known to be especially vicious. The bite set up blood poisoning, and the applicant had to have two joints of his finger amputated.

The county court judge was of opinion that the accident arose out of and in the course of the employment and he made an award in favour of the applicant.

Macgillivray, for the appellant. This accident did not arise out of and in the course of the employment: *Smith* v. *Lancashire*

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and Yorkshire Ry. Co. (1); *Benson* v. *Lancashire and Yorkshire Ry. Co.* (2)

Clement Edwards, for the respondent, was not called upon.

COZENS-HARDY M.R. In my opinion this is a reasonably plain case. The workman was employed in a stable. He was taking a meal in the stable where he was entitled to be and which was his proper place. Part of what may be called the necessary furniture of a stable is a stable cat. There is no suggestion that this cat was known to be especially vicious. The employment of the man took him into the stable, where to the man's knowledge and to the knowledge of the employer a cat was habitually kept. If the cat had been a strange cat the case would have presented a totally different aspect, and I hope that nothing I have said will lend itself to the conclusion that if the man had been walking along the street and a cat had bitten him his master would have been liable. The present case is the same as if the man had been an ordinary domestic servant whose duties took him into the place where the cat was. Neither the employer nor the man expected the cat to bite, but the man's duties took him into the place where the cat was. In my opinion, therefore, the decision of the learned county court judge was right and the appeal must be dismissed.

FARWELL L.J. I agree. The cat was part of the farm establishment and the workman was properly sitting in the stable to eat his dinner. If it had been proved that the workman was using his dinner to incite the cat this decision might have been different. Here the evidence is that he was doing nothing but sitting in the stable eating his dinner and the cat sprang at him.

KENNEDY L.J. concurred.

Appeal dismissed.

Solicitors: *Smiles & Co., for H. G. C. Day, Liverpool; Corbin Greener & Cook, for William Webster, St. Helens, Lancashire.*

(1) [1899] 1 Q. B. 141. (2) [1904] 1 K. B. 242.

H. B. H.

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BAILMENT—*Bailee for hire—Hiring Agreement with Option to Purchase—Power to Owner to retake Possession on Breach of Agreement by Hirer—Default of Hirer in payment of Rent—Right of Owner to sue for Arrears of Rent after retaking Possession.*

The owner of furniture agreed to let it on hire on the terms of the hirer paying a lump sum in consideration of an option to purchase it at any time during the period of hiring and further paying a monthly sum by way of rent. The agreement provided that the hirer might at any time terminate the hiring on giving a week's notice and delivering up the goods without prejudice to the owner's right to recover any arrears of rent, and that if the hirer did not duly perform the agreement the owner might retake possession of the furniture. The hirer being in arrear with the rent, the owner retook possession under the agreement :—

Held, that the owner by so retaking possession had not abandoned his right to sue for the arrears of rent.

Hewison v. *Ricketts*, (1894) 63 L. J. (Q.B.) 711, distinguished. BROOKS *v.* BEIRNSTEIN **Div. Ct. 98**

BANKRUPTCY—*Discharge — Practice — Bankrupt's Application for Discharge—Creditors "to be notified"—Fees—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 127—*Bankruptcy Act*, 1890 (53 & 54 *Vict. c.* 71), *s.* 8, *sub-s.* 6—*Bankruptcy Rules*, 1886 *and* 1890, *r.* 235—*Scale of Fees*, 1890, *Table A.*

Rule 235 of the Bankruptcy Rules, 1886 and 1890, which provides that notice of a bankrupt's application for his discharge shall be sent to the creditors "whether they have proved or not," is not inconsistent with sub-s. 6 of s. 8 of the Bankruptcy Act, 1890, which enacts that the notice shall be sent to "each creditor who has proved." The rule merely imposes a further obligation on the bankrupt. Notice, therefore, of a bankrupt's application for his discharge must be sent not only to each creditor who has proved, but also to each person whose name the debtor has entered in his statement of affairs as a creditor, and the bankrupt must pay the scale fee of "1*s.* for each creditor to be notified," in Table A to the Act of 1890, in respect of all such creditors. *In re* SPRATLEY - - - - **Bigham J. 559**

2. —— *Married Woman—Separate Trading —Separate Property—Receiving Order—Jurisdiction—Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 5.

Sect. 1, sub-s. 5, of the Married Women's Property Act, 1882, imposes only one condition precedent to the jurisdiction of the Court to make a married woman a bankrupt, namely, that she shall be carrying on a trade separately from her husband. The existence of separate property at the date when the receiving order is applied for is not a condition precedent to the jurisdiction of the Court, although the absence of separate property is a matter to be considered by the Court in the exercise of its jurisdiction.

A trade belonging exclusively to a married woman but managed by her husband on her behalf is a trade carried on by the married woman separately from her husband within the meaning of the Married Women's Property Act, 1882.

In re Helsby, (1893) 1 Mans. 12, considered. *In re* SIMON - - - - - **C. A. 201**

3. —— *Mutual Dealings—Set-off—Company —Debenture Stock—Claim to set off Debenture Stock against petitioning Creditor's Debt — Equitable Execution — Receiver of Debtor's Interest in Debenture Stock—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 7, *sub-s.* 3 ; *s.* 38.

Moneys which under a bankruptcy become payable to the trustee by the petitioning creditor because they were payable to the debtor come prima facie within the mutual credits section (s. 38), but not if they are moneys which upon bankruptcy become payable to the trustee in his right as trustee, and not by virtue of their being payable to the debtor.

In October, 1908, a debtor holding debenture stock in the petitioning creditor company claimed to be entitled to set this off against the petitioning creditor's debt. In November following, but before the bankruptcy petition was disposed of, a receiver was appointed on behalf of another creditor of the debtor's interest in the debenture stock :—

Held (reversing the decision of the registrar in bankruptcy), that an essential change was effected by the appointment of the receiver ; thenceforward there were no mutual credits between the petitioning creditor and the debtor, and though the effect of an adjudication in bankruptcy would be to defeat the title of the receiver and give a title to the trustee, that would not suffice to bring s. 38 into force, and consequently that the petitioning creditor was entitled to a receiving order.

In re Pollitt, Ex parte Minor, [1893] 1 Q. B. 455, applied. *In re* A DEBTOR ; *Ex parte* PEAK HILL GOLDFIELD, LIMITED - **C. A. 430**

4. —— *Practice—Time for entering an Appeal —Deposit on Appeal—Notice of Appeal—Extending Time—Bankruptcy Rules*, 1886, *rr.* 130, 131, 132, 134—*Rules of Supreme Court, Order LVIII., r.* 1.

On appealing from an order made by a Bankruptcy Court, the appeal must be entered and the deposit paid and the notice of appeal must be given within the time limited for bringing an appeal by r. 130 of the Bankruptcy Rules, 1886.

In re TAYLOR ; *Ex parte* BOLTON **Bigham J. 103**

5. —— *Practice—Time for entering an Appeal —Deposit on Appeal—Notice of Appeal—Extending Time—Form of Order.*

Notice of appeal against an order of discharge

BANKRUPTCY—*continued.*
had been served by the bankrupt on the trustee in the bankruptcy, but the appeal had not been entered, within twenty-one days of the signing of the order.

The order as passed and entered was as follows: "It is ordered that this application be and it is hereby refused with costs to be taxed and paid by the above-named bankrupt. . . . . And this Court doth further order that if the deposit of 20*l.* be made by or on behalf of the above-named bankrupt, and the appeal be duly entered by him pursuant to the provisions of rule 131 of the Bankruptcy Rules, 1886 and 1890, within three days of this date, the appeal to be in the list for hearing on Friday, the 6th of April, 1906, the time for entering the appeal paying the required deposit and duly serving the respondent with notice of appeal be and it is hereby extended meanwhile."
In re DALLMEYER (March 30, 1906) **C. A. 105, n.**

6. —— *Small Bankruptcy—Costs—Taxation—Bankruptcy Rules*, 1886–1890, *r.* 112, *sub-ss.* 1, 2; *Appendix, Part II. (Scale of Costs).*

Rule 112 of the Bankruptcy Rules, 1886–1890, which regulates the scale of costs and charges in proceedings under the Bankruptcy Acts, applies only to proceedings in the Bankruptcy Court.

Therefore where in a small bankruptcy a solicitor, acting upon the instructions of the official receiver, applied to the Probate Court for a grant of letters of administration to the estate of the bankrupt's wife:—

Held, that in taxing the costs of these proceedings as between solicitor and client the scale of costs provided in the case of small bankruptcies by sub-s. 2 of r. 112, whereby the solicitor is allowed three-fifths only of the charges ordinarily allowed, did not apply, and that the solicitor was entitled to his full costs.

In re Parfitt, (1889) 23 Q. B. D. 40, followed and approved. *In re* WEIGHELL - **C. A. 92**

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BASTARDY—*Agreement by Father to pay Mother for Maintenance of Bastard Child—Death of Mother—Right of Mother's Administrator to sue on Agreement.*

By an agreement in writing the father of a bastard child agreed to pay to the mother a certain weekly sum until the child should attain a certain age, and in consideration of those payments the mother agreed not to apply to justices for a bastardy order and further agreed to maintain and bring up the child. On the death of

BASTARDY—*continued.*
the mother before the child had attained the stipulated age the father discontinued the payments. The administrator of the mother's estate brought an action against the father upon the agreement:—

Held, that the father's obligation came to an end with the mother's death and that the action would not lie. JAMES *v.* MORGAN - **Div. Ct. 564**

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Not followed on one point by C. A. ATTORNEY-GENERAL *v.* TILL **[1909] 1 K. B. 694**

—— *Lucas and Chesterfield Gas and Water Board, In re*, [1908] 1 K. B. 571.
On appeal, the award remitted to umpire - - **C. A. [1909] 1 K. B. 16**

—— *McDonald* v. *Banana (Owners of Steamship)*, [1908] 2 K. B. 926.
Followed by C. A. MOORE *v.* MANCHESTER LINERS, LIMITED **[1909] 1 K. B. 417**

—— *Parfitt, In re* - (1889) 23 Q. B. D. 40
Followed and approved by C. A. *In re* WEIGHELL - - **[1909] 1 K. B. 92**

—— *Pedersen* v. *Lotinga*, (1857) 28 L. T. (O.S.) 267.
Distinguished by Bray J. REDERIACTIESELSKABET "SUPERIOR" *v.* DEWAR & WEBB - **[1909] 1 K. B. 948**

—— *Phipps* v. *London and North Western Ry. Co.*, [1892] 2 Q. B. 229.
Followed by the Court of Railway and Canal Commission. HOLWELL IRON COMPANY *v.* MIDLAND RAILWAY COMPANY - - **[1909] 1 K. B. 486**

—— *Pollitt, In re, Ex parte Minor*, [1893] 1 Q. B. 455.
Applied by C. A. *In re* A DEBTOR **[1909] 1 K. B. 430**

—— *Reg.* v. *Denbighshire Justices*, (1885) 15 Q. B. D. 451.
Discussed by C. A. RHONDDA VALLEY BREWERIES COMPANY *v.* PONTYPRIDD UNION ASSESSMENT COMMITTEE **[1909] 1 K. B. 652**

—— *Reg.* v. *Gavin* - (1884) 15 Cox, C. C. 656
Overruled by C. C. A. REX *v.* BEST **[1909] 1 K. B. 692**

—— *Reg.* v. *Great Western Ry. Co.*, (1869) L. R. 4 Q. B. 323.
Discussed by C. A. RHONDDA VALLEY BREWERIES COMPANY *v.* PONTYPRIDD UNION ASSESSMENT COMMITTEE **[1909] 1 K. B. 652**

—— *Roddam* v. *Morley*, (1857) 1 De G. & J. 1
Applied by Channell J. READ *v.* PRICE - - - **[1909] 1 K. B. 577**

CASES—*continued.*

—— *Rothwell* v. *Davies*, (1903) 19 Times L. R. 423.
Explained and distinguished by C. A. WARNCKEN *v.* R. MORELAND & SON, LIMITED - - [1909] 1 K. B. 184

—— *Seroka* v. *Kattenburg*, (1886) 17 Q. B. D. 177
Criticized by Fletcher Moulton L.J. CUENOD *v.* LESLIE [1909] 1 K. B. 880

—— *Smith* v. *Thorne* - - (1852) 18 Q. B. 134
Distinguished by C. A. COOPER *v.* KENDALL - - [1909] 1 K. B. 405

—— *Tanner* v. *Smart* - (1827) 6 B. & C. 603
Distinguished by C. A. COOPER *v.* KENDALL - - [1909] 1 K. B. 405

—— *Watkins* v. *Watkins* - - [1896] P. 222
Considered and applied by C. A. PAQUINE *v.* SNARY [1909] 1 K. B. 688

—— *West Lancashire Rural Council* v. *Lancashire and Yorkshire Ry. Co.*, [1903] 2 K. B. 394.
Distinguished by Jelf J. HERTFORDSHIRE COUNTY COUNCIL *v.* GREAT EASTERN RAILWAY COMPANY [1909] 1 K. B. 368

—— *Williams* v. *Ocean Coal Co.*, [1907] 2 K. B. 422.
Principle of, applied by C. A. SCHOFIELD *v.* ORRELL COLLIERY COMPANY - - [1909] 1 K. B. 178

CAT BITE—Workmen's compensation—Accident arising out of and in the course of employment - - - - 963
See EMPLOYER AND WORKMAN. 3.

"CHARGES" — Dead freight—Ship—Charterparty—Lien—Demurrage, payable day by day - - - - - - 948
See SHIPPING. 1.

CHARTERPARTY—Lien—Demurrage, payable day by day—"Charges"—Dead freight.
See SHIPPING. 1. 948

CERTIFICATE — Analysis — Butter and Margarine Act, 1907—Sale of food and drugs—Form of certificate - - 1
See ADULTERATION.

CHILD.
See under INFANT.

COMPANY—*Liability upon Bills of Exchange—Bills accepted by Director in Name of Company without Authority in fact—"Person acting under the authority of the company"—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 47.

Certain bills of exchange drawn on a limited company were accepted by one of its directors in the company's name, the bills also being signed by the director.

The company received no part of the proceeds of the bills nor any consideration for the acceptances, which, although the director had no fraudulent intention, were in fact in fraud of the company. The plaintiffs were holders in due course of the bills.

Among the objects of the company as defined by its memorandum were the drawing, making, accepting, indorsing, and discounting of bills and promissory notes, and the directors were authorized to delegate any of their powers to committees consisting of such member or members of their body as they thought fit.

Before the date of the acceptances a resolution had been passed by the directors requiring all bills of exchange to be signed by one director and countersigned by the secretary.

In an action against the company as acceptors to recover the amount of the bills:—

Held that, as the director had no authority in fact to accept the bills of exchange, he was not, in accepting them, "acting under the authority of the company" within the meaning of s. 47 of the Companies Act, 1862, and that therefore the company was not liable upon the bills. PREMIER INDUSTRIAL BANK, LIMITED *v.* CARLTON MANUFACTURING COMPANY, LIMITED, AND CRABTREE, LIMITED - Pickford J. 106

COMPANY—*continued.*

—— Mutual dealings — Set-off — Receiver of debtor's interest in debenture stock
See BANKRUPTCY. 3. 430

—— Promissory note—Signature by managing director—Personal liability - 927
See PROMISSORY NOTE.

—— Railway company.
See under RAILWAY.

—— Stamp—Capital of company—"Increase of registered capital" - - - 677
See REVENUE. 5.

COMPENSATION—Licensing Acts.
See under LICENSING ACTS.

—— Reservoir, Special adaptability for—Land compulsorily taken - - - 16
See WATERWORKS.

—— Workmen's compensation.
See under EMPLOYER AND WORKMAN.

CONDITION — Probation of offenders — Recognizance — Condition as to abstention from intoxicating liquor - - 892
See CRIMINAL LAW. 9.

CONDITIONAL—Simple contract debt—Acknowledgment—Conditional or limited promise - - - - - 405
See LIMITATIONS, STATUTE OF.

CONFLICT OF LAWS—International law.
See under INTERNATIONAL LAW.

CONSENT — Metropolis — Buildings erected beyond the general line—Consent of Metropolitan Board of Works—Alteration of general line of buildings - 116
See LONDON, 1.

CONSIDERATION—Railway—Traffic management — Undue preference — Adequate consideration—Rebate - - **486**
See RAILWAY. 4.

CONTRACT—Breach of—Sale of goods—Slag to be severed and removed by purchaser—Defect of title—Damages - - **357**
See VENDOR AND PURCHASER.

—— "Completion of contract"—Highway—Repair—Extraordinary traffic - **471**
See HIGHWAY. 2.

—— Trade dispute—Strike—Breach of contract by workmen—Strike pay - - **310**
See TRADE UNION. 1.

CONTRACT OF SERVICE—Implied term of—Negligence of fellow servants - **530**
See EMPLOYER AND WORKMAN. 1.

CONTRACTOR — Workmen's compensation — Execution by contractor of work undertaken by principal — Liability of principal - - - - - - **389**
See EMPLOYER AND WORKMAN. 8.

CONTRIBUTION—Street improvement—Act of foreign Legislature—Action in England
See INTERNATIONAL LAW. 7

CONVEYANCING AND LAW OF PROPERTY—Lease by mortgagor in possession—Lease including land other than mortgaged land—Option to determine—Option to renew - - - - **837**
See MORTGAGE.

CONVICTION—Criminal law.
See under CRIMINAL LAW.

COPY—Music—"Pirated copy of musical work"—Perforated music roll—Mechanical instrument - - - - - **515**
See COPYRIGHT.

COPYRIGHT—*Music—"Pirated Copy of Musical Work" — Perforated Music Roll — Mechanical Instrument—Musical (Summary Proceedings) Copyright Act*, 1902 (2 *Edw. 7, c.* 15), *ss.* 2, 3.

A perforated music roll, which, when put on a mechanical instrument known as a piano player, produces the notes of a pianoforte accompaniment of a copyright song in much the same way as when the accompaniment is played on a piano with the fingers, is not, upon the authority of *Boosey* v. *Whight*, [1900] 1 Ch. 122, a pirated "copy" of a musical work within the meaning of the Musical (Summary Proceedings) Copyright Act, 1902, so as to authorize proceedings being taken under the Act for the purpose of having the perforated music roll forfeited, destroyed, or otherwise dealt with. MABE *v.* CONNOR - - - - - - **Div. Ct. 515**

CORPORATION — Workmen's compensation — Contract for execution of work undertaken by principal - - - **165**
See EMPLOYER AND WORKMAN. 6.

COSTS—Bankrupt's application for discharge—Creditors "to be notified"—Fees - **569**
See BANKRUPTCY. 1.

COSTS—*continued.*

—— Bankruptcy, Small—Taxation - - **92**
See BANKRUPTCY. 6.

—— Local government — Special expenses—Precept to overseers—Appeal against apportionment — Change of overseers pending appeal - - - - - **768**
See LOCAL GOVERNMENT. 3.

—— Local inquiry — Remuneration — "Expenses"—Liability of district council
See LOCAL GOVERNMENT. 2. **554**

—— Overseer — Solicitor—Exemption—Appeal to quarter sessions—Costs—Writ of privilege - - - - - - **449**
See POOR LAW. 1.

—— Security for costs—Action by trustee for wife under separation deed—"Nominal plaintiff" - - - - - - **50**
See PRACTICE. 2.

—— Sheriff—"Execution for a sum exceeding 20*l.*"—Contingent expenses—Bankruptcy Act - - - - - - **760**
See SHERIFF.

COUNTY COURT—*Practice—Judgment Summons—Default in Appearance—Fine—Application of Fine in reduction of Judgment Debt—Jurisdiction—County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 111—*County Court Rules*, 1903 *and* 1904, *Order XXV., r.* 31 (3A).

By s. 111 of the County Courts Act, 1888, as applied by Order XXV., r. 31 (3A), of the County Court Rules, 1903 and 1904, to a judgment summons, a judgment debtor is liable to a fine for refusing or neglecting, without sufficient cause, to appear at the hearing of a judgment summons, "and the whole or any part of such fine, in the discretion of the judge, after deducting the costs, shall be applicable towards indemnifying the party injured by such refusal or neglect":—

Held, that the judge has no jurisdiction to apply the fine in reduction of the judgment debt. THE KING *v.* HIS HONOUR JUDGE SNAGGE **C. A. 644**

—— Distress—Exemption—Wearing apparel, bedding, and tools and implements of trade - - - - - - - **14**
See DISTRESS.

—— Workmen's compensation—Infant dependants—Payment into Court—Approval of registrar—Jurisdiction of county court judge - - - - - **191**
See EMPLOYER AND WORKMAN. 5.

COUNTY COURT RULES, 1903 and 1904, Order XXV., r. 31 (3A) - - **644**
See COUNTY COURT.

CRIMINAL LAW—*Appeal to Court of Criminal Appeal involving Questions of Fact—Right of Prisoner to be present—Waiver of Right by Counsel—Criminal Appeal Act*, 1907 (7 *Edw. 7, c.* 23), *s.* 11, *sub-s.* 1.

Where an appeal to the Court of Criminal Appeal involves questions of fact and the

CRIMINAL LAW—*continued.*

prisoner desires to be present, the Court has no power under s. 11, sub-s. 1, of the Criminal Appeal Act, 1907, to hear the appeal in his absence. THE KING *v.* DUNLEAVEY **C. C. A. 200**

2. —— *Cruelty to Animals—Irregularity in Form of Summons—More than one Offence charged—Election by Prosecution on what Charge to proceed—Cruelty to Animals Act*, 1849 (12 & 13 *Vict. c.* 92), *s.* 2.

The Cruelty to Animals Act, 1849, s. 2, enacts that "if any person shall . . . . cruelly . . . . ill-treat, ... abuse, or torture . . . . any animal" he shall be liable to a penalty :—

Held, that the words "ill-treat," "abuse," and "torture" create three separate offences, and that therefore a conviction for "ill-treating, abusing, and torturing" would be bad.

When a summons is issued under s. 2 of the Cruelty to Animals Act, 1849, the justices cannot decline to proceed merely on the ground that the summons is irregular in form or is open to objection on the ground of an alleged defect. They should hear the evidence, but when it has been given they must make up their minds whether an offence under the summons has been proved, and at that stage it is not placing too great a burden on the prosecutor to ask him to specify the offence which he alleges the evidence supports. JOHNSON *v.* NEEDHAM **Div. Ct. 626**

3. —— *Evidence—Admissibility — Prisoner in custody—Statement in reply to Question put by Police Constable—Validity of Conviction.*

The fact that a prisoner's statement is made by him in reply to a question put to him by a police constable after he is in custody does not of itself render the statement inadmissible in evidence.

Reg. v. *Gavin*, (1885) 15 Cox, C. C. 656, overruled. THE KING *v.* BEST - **C. C. A. 692**

4. —— *Evidence—Nature or Conduct of Defence—Imputation on Character of Witness for Prosecution—Cross-examination of Person charged—Criminal Evidence Act*, 1898 (61 & 62 *Vict. c.* 36), *s.* 1, *sub-s.* (*f*) (ii.).

Upon the trial of an indictment for an offence one of the issues was whether the defendant was the man who was seen near the place where the offence was committed. Two witnesses identified the defendant at the police station as the man they had seen near the place, but a third person failed to identify him. With respect to this latter occasion the defendant in his evidence stated that the police inspector, who was present on the occasion and who gave evidence for the prosecution, said to the constable who was sent to bring the person in for the purpose of seeing whether he could identify the defendant, "the second," or something like it; that he (the defendant) was placed second from one end of a row of men; and that the person who was brought in did not pick him out, but picked out the man who was second from the other end. Counsel for the prosecution was then allowed to ask the defendant whether he had not been convicted on previous occasions. No reliance was placed upon the above evidence in support of the defence, nor was the defence conducted on the footing that the inspector's evidence ought not to be believed :—

Held, that the allegation of the defendant, so far as it reflected on the inspector, was made with reference to the conduct of the identification proceedings, which were relevant to the defence; that, though the identification on the particular occasion had failed, and therefore the allegation was not strictly relevant to the defence, it was natural for the defendant to make some comment on those proceedings; and that the nature or conduct of the defence was not such as to involve imputations on the character of the inspector within the meaning of s. 1, sub-s. (*f*) (ii.), of the Criminal Evidence Act, 1898, so as to allow the defendant to be cross-examined as to previous convictions. THE KING *v.* PRESTON - - - - - **C. C. A. 568**

5. —— *Evidence—Subpœna—Setting aside —Inherent Jurisdiction of Court—Subpœna not issued for Purpose of obtaining relevant Evidence —Practice.*

The King's Bench Division of the High Court of Justice has jurisdiction to set aside a subpœna issued in a criminal proceeding.

A witness served with a subpœna cannot get it set aside by merely swearing that he can give no material evidence. But the Court, being satisfied that writs of subpœna ad testificandum had been issued not bona fide for the purpose of obtaining relevant evidence and that the witnesses named in them were in fact unable to give relevant evidence, set the subpœna aside.

Where a subpœna is set aside the power of the judge at the trial to order the witnesses to attend, if he thinks their presence necessary, is in no way interfered with. THE KING *v.* BAINES - - - - - **Div. Ct. 258**

6. —— *Incorrigible Rogue — Sentence by Quarter Sessions—Appeal—Vagrancy Act*, 1824 (5 *Geo.* 4, *c.* 83), *ss.* 3, 4, 5—*Criminal Appeal Act*, 1907 (7 *Edw.* 7, *c.* 23), *s.* 19; *s.* 20, *sub-s.* 2.

The appellant was convicted by a petty sessional court of being an incorrigible rogue within s. 5 of the Vagrancy Act, 1824, for that he did beg for alms after having been twice previously convicted of being an idle and disorderly person, and he was sentenced by quarter sessions to one year's imprisonment with hard labour. The appellant petitioned the Home Secretary against his sentence, who referred the case to the Court of Criminal Appeal under s. 19 (*a*) of the Criminal Appeal Act, 1907 :—

Held, that a person sentenced by quarter sessions as an incorrigible rogue can under s. 20, sub-s. 2, of the Criminal Appeal Act, 1907, appeal against the sentence, but not against the conviction.

Held, also, that as the appellant had not at some former time been adjudged to be a rogue and vagabond within s. 4 of the Vagrancy Act, 1824, and duly convicted thereof, the quarter sessions had no power to sentence him as an incorrigible rogue. THE KING *v.* JOHNSON **C. C. A. 439**

CRIMINAL LAW—*continued.*

7. —— *Murder—Drunkenness—Manslaughter—Prisoner so affected by Drink as to be incapable of knowing that his act is dangerous—Direction to Jury.*

Upon the trial of an indictment for murder the question whether the jury are justified in returning a verdict of manslaughter on the ground of the voluntary drunkenness of the prisoner may be determined by the following rule:—

A man is taken to intend the natural consequences of his acts. This presumption may be rebutted, in the case of a man who is drunk, by shewing his mind to have been so affected by the drink he had taken that he was incapable of knowing that what he was doing was dangerous, i.e., likely to inflict serious injury. If this be proved, the presumption that he intends to do grievous bodily harm is rebutted.

Upon the trial of a prisoner for murder evidence was given that he was drunk at the time of the commission of the act charged, and the judge gave the following direction to the jury:—

"In the first place, every one is presumed to know the consequences of his acts. If he be insane, that knowledge is not presumed. Insanity is not pleaded here, but where it is part of the essence of a crime that a motive, a particular motive, shall exist in the mind of the man who does the act, the law declares this—that if the mind at that time is so obscure by drink, if the reason is dethroned and the man is incapable therefore of forming that intent, it justifies the reduction of the charge from murder to manslaughter":—

Held, that the direction was right. THE KING *v.* MEADE - - - **C. C. A. 895**

8. —— *Perjury — Judicial Proceeding — Arbitration under Workmen's Compensation Act*, 1906 (6 *Edw. 7, c.* 58).

An arbitration before a county court judge to settle a question of compensation under the Workmen's Compensation Act, 1906, is a judicial proceeding, and therefore an indictment for perjury will lie in respect of false evidence given on oath in a material particular in the course of the arbitration. THE KING *v.* CROSSLEY - - - - - **C. C. A. 411**

9. —— *Probation of Offenders—Conviction for Offence not involving Drunkenness—Release on Probation—Recognizance—Condition as to Abstention from Intoxicating Liquor—Probation of Offenders Act*, 1907 (*7 Edw. 7, c.* 17), *s.* 1, *sub-s.* 2; *s.* 2, *sub-s.* 2 (*b*).

When a prisoner has been convicted on indictment of an offence punishable with imprisonment but which was in no way connected with indulgence in drink, and the Court in lieu of imposing a sentence of imprisonment makes an order under s. 1, sub-s. 2, of the Probation of Offenders Act, 1907, discharging the offender conditionally on his entering into a recognizance to be of good behaviour and to appear for sentence when called on at any time during a period not exceeding three years, the Court has no power to order an additional condition as to abstention from intoxicating liquor to be inserted in the recognizance, inasmuch as s. 2, sub-s. 2 (*b*), of the Act of 1907 only authorizes the condition to be inserted in the recognizance where the offence of which the prisoner was convicted was drunkenness or an offence committed under the influence of drink. Therefore a sentence inflicted for breach of the condition is liable to be quashed. THE KING *v.* DAVIES - - **C. C. A. 892**

CRIMINAL LAW—*continued.*

10. —— *Validity of Sentence — Habitual Drunkard—Conviction for being guilty of Disorderly Behaviour while Drunk—Three previous Summary Convictions for Offences involving Drunkenness—Power to order Imprisonment in addition to Detention — Inebriates Act*, 1898 (61 *&* 62 *Vict. c.* 60), *s.* 2, *sub-s.* 1.

By the Inebriates Act, 1898, s. 2, sub-s. 1, "Any person who commits any of the offences mentioned in the First Schedule to this Act, and who within the twelve months preceding the date of the commission of the offence has been convicted summarily at least three times of any offences so mentioned, and who is a habitual drunkard, shall be liable upon conviction on indictment, or if he consents to be dealt with summarily on summary conviction, to be detained for a term not exceeding three years in any certified inebriate reformatory the managers of which are willing to receive him":—

Held, that where a person is convicted on an indictment preferred against him under the section a sentence of imprisonment with hard labour cannot be inflicted upon him in addition to the detention in a certified inebriate reformatory authorized by the section. THE KING *v.* BRIGGS - - - - - **C. C. A. 381**

—— Jurisdiction of justice to convict—"Before the charge is gone into" - - **949**
See JUSTICES.

—— Justices.
See under JUSTICES.

—— Summary jurisdiction.
See under JURISDICTION.

CROSSING—Railway—Level crossing—Repair of roadway - - - - - **368**
See RAILWAY. 2.

CRUELTY TO ANIMALS—Irregularity in form of summons - - - - **626**
See CRIMINAL LAW. 2.

DAMAGES—Railway — Traffic management — Undue preference - Rebate—Claim for damages - - - - - **486**
See RAILWAY. 4.

—— Sale of goods—Interest in land—Slag to be severed and removed by purchaser—Breach of contract—Defect in title **357**
See VENDOR AND PURCHASER.

DEATH—Bastardy — Maintenance — Death of mother—Right of mother's administrator to sue on agreement - - **564**
See BASTARDY.

DEBENTURES—Company.
See under COMPANY.

DEBT—Simple contract debt—Acknowledgment—Conditional or limited promise - **405**
See LIMITATIONS, STATUTE OF.

DECLARATORY JUDGMENT.
See under JUDGMENT.

DEFAMATION — Slander — Discovery — Interrogatories—Defence of fair comment
See PRACTICE. 1. **239**

DEMURRAGE— Ship — Charterparty — Lien — Demurrage, payable day by day—"Charges"—Dead freight - - **948**
See SHIPPING. 1.

DENTIST—*Unregistered Person—Description—"Specially qualified to practise Dentistry"—Dentists Act*, 1878 (41 & 42 *Vict. c.* 33), *s.* 3.

By the Dentists Act, 1878, s. 3, "A person shall not be entitled to take or use the name or title of 'dentist' (either alone or in combination with any other word or words), or of 'dental practitioner,' or any name, title, addition, or description implying that he is registered under this Act or that he is a person specially qualified to practise dentistry, unless he is registered under this Act."

The words in the above section "specially qualified to practise dentistry" are not used in a technical sense as referring only to a qualification conferred by some public body by the grant, for instance, of a diploma or degree, but include special personal qualifications to practise dentistry acquired by study and practice.

The appellant, who was not registered under the Act and was not a legally qualified medical practitioner, carried on a dentist's practice at premises on the inner door and windows of which he exhibited his name and a notice as follows: "H. J. Barnes. Finest artificial teeth at moderate prices. Extractions, Advice free. Hours 10—7. English and American teeth, Advice free. Painless extractions." His room was fitted as a dentist's operating room. The appellant having been convicted by a Court of summary jurisdiction of having taken and used a description implying that he was specially qualified to practise dentistry:—

Held, that there was evidence upon which the appellant could be convicted of an offence under s. 3 of the Act. BARNES *v.* BROWN **Div. Ct. 38**

DEPENDANT — Workmen's compensation — Infant dependants — Payment into Court—Approval of registrar—Jurisdiction of county court judge - **191**
See EMPLOYER AND WORKMAN. 5.

—— Workmen's compensation — Posthumous illegitimate child - - - **178**
See EMPLOYER AND WORKMAN. 4.

DEPOSIT—Bankruptcy—Time for entering an appeal—Deposit on appeal **103, 105, n.**
See BANKRUPTCY. 4, 5.

DETERMINE—Option to—Lease by mortgagor in possession — Lease including land other than mortgaged land—Option to renew - - - - - - **837**
See MORTGAGE.

DIRECTOR—Company—Liability upon bills of exchange—Bill accepted by director in name of company without authority in fact - - - - - - **106**
See COMPANY.

—— Company—Promissory note—Signature by managing director—Personal liability
See PROMISSORY NOTE. **927**

DISCHARGE — Bankrupt's application for — Creditors "to be notified"—Fees **559**
See BANKRUPTCY. 1.

DISCOVERY — Interrogatories — Action for slander—Defence of fair comment **239**
See PRACTICE. 1.

DISEASE — Death caused by accident—Intervening cause—Disease directly caused by accident - - - - - **591**
See INSURANCE (ACCIDENT).

DISTRESS — *Exemption — Wearing Apparel, Bedding, and Tools and Implements of Trade to value of Five Pounds—Law of Distress Amendment Act*, 1888 (51 & 52 *Vict. c.* 21), *s.* 4—*County Courts Act*, 1888 (51 & 52 *Vict. c.* 43), *s.* 147.

The protection from distress conferred by s. 4 of the Law of Distress Amendment Act, 1888, and s. 147 of the County Courts Act, 1888, is limited to wearing apparel, bedding, tools and implements of trade to the value of 5*l.* in all. BOYD, LIMITED *v.* BILHAM - **Channell J. 14**

—— Poor rate—Non-payment of—Application for distress warrant — Jurisdiction of justices to go behind rate - - **860**
See RATES. 1.

DRUGS—Sale of food and.
See under ADULTERATION.

DRUNKENNESS — "*Habitual Drunkard*" — *Person incapable of managing own Affairs when drunk—Habitual drinking to excess—Capacity to manage own Affairs when sober—Habitual Drunkards Act*, 1879 (42 & 43 *Vict. c.* 19), *s.* 3—*Inebriates Act*, 1898 (61 & 62 *Vict. c.* 60), *s.* 2, *sub-s.* 1.

The expression "habitual drunkard" in s. 3 of the Habitual Drunkards Act, 1879, and s. 2, sub-s. 1, of the Inebriates Act, 1898, applies to a person who habitually drinks to excess, and who is, when drunk, dangerous or incapable of managing himself or his affairs, even though when sober he is capable of managing himself and his affairs. EATON *v.* BEST - **Div. Ct. 632**

—— Conviction for offence not involving drunkenness—Release on probation—Condition as to abstention from intoxicating liquor - - - - **892**
See CRIMINAL LAW. 9.

DRUNKENNESS—*continued.*

—— Murder — Manslaughter — Prisoner so affected by drink as to be incapable of knowing that his act is dangerous—Direction to jury - - - - **895**
See CRIMINAL LAW. 7.

—— Validity of sentence—Habitual drunkard—Power to order imprisonment in addition to detention - - - - **381**
See CRIMINAL LAW. 10.

DUTY—Revenue.
See under REVENUE.

EDUCATION—*Child employed in Agriculture—Exemption from School Attendance — Child between Thirteen and Fourteen Years of Age—By-law of Local Education Authority—Elementary Education (School Attendance) Act* (1893) *Amendment Act*, 1899 (62 & 63 *Vict. c.* 13), *s.* 1 —*Elementary Education Act*, 1900 (63 & 64 *Vict. c.* 53), *s.* 6, *sub-s.* 1.

The power of the local education authority, under the proviso in s. 1 of the Elementary Education (School Attendance) Act (1893) Amendment Act, 1899, to make a by-law for any parish within their district providing for the total exemption from school attendance of a child between thirteen and fourteen years of age who is to be employed in agriculture, though the child has not received a certificate of educational proficiency, is not affected by s. 6 of the Elementary Education Act, 1900. STRONG *v.* TREISE - - - - - - **Div. Ct. 613**

—— Water, Supply of—Maintenance of school —Liability of local education authority
See SCHOOLS. **824**

ELECTION (MUNICIPAL).
See under PARLIAMENT.

ELEMENTARY EDUCATION.
See under EDUCATION.

EMPLOYER AND WORKMAN — *Common Employment — Risk incidental to Employment — Negligence of Fellow Servants—Implied Term of Contract of Service—Accident to Workman while leaving Employers' Premises after Conclusion of Day's Work.*

Where colliery proprietors, who possessed a railway in connection with their colliery, were accustomed voluntarily to run a train thereon for the carriage of their colliers, free of charge, from the colliery towards the place where they lived, after their day's work was done, and a collier in their employ, while being so carried, met his death through an accident occasioned by the negligence of servants of his employers engaged in the repair of a bridge over the railway :—

Held (affirming the judgment of Bray J.), that the deceased man must, as between himself and his employers, be deemed to have undertaken the risk of such an accident, and therefore an action could not be maintained against his employers under the Fatal Accidents Act, 1846, in respect of his death. COLDRICK *v.* PARTRIDGE, JONES & CO. - - - - **C. A. 530**

EMPLOYER AND WORKMAN—*continued.*

2. —— *Compensation—Basis of Calculation—"Average Weekly Earnings"—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Sched. I., ss.* 1, 2.

A miner in the employment of a colliery company was injured by an accident and thereby totally incapacitated. He had been employed by the company in the same grade throughout the whole of the twelve months preceding the accident. During that period he earned 68*l.*, but only actually worked for thirty-three weeks. Of the remaining nineteen weeks of the year there were fourteen weeks of stoppage, two weeks of public holidays, two weeks when he was ill, and one week when he took a holiday. In proceedings by the workman to recover compensation under the Workmen's Compensation Act, 1906, it was found that the fourteen weeks of stoppage and the two weeks of public holidays were normal and recognized incidents of the employment, and that out of thirty-six working weeks the workman had worked thirty-three :—

Held, that the proper method of computing his "average weekly earnings" was to divide the 68*l.* by 33, and then make a fractional deduction of $\frac{19}{52}$, as suggested by Fletcher Moulton L.J. in *Bailey* v. *Kenworthy*, [1908] 1 K. B. 441, at p. 466.

The statement in the head-note to *Bailey* v. *Kenworthy* that "days in which no work is done and no wages are earned are to be disregarded" is too wide. ANSLOW *v.* CANNOCK CHASE COLLIERY COMPANY - - - **C. A. 352**

3. —— *Compensation — Cat Bite — Accident arising out of and in the Course of Employment—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

A teamster in the course of his employment was eating his dinner in his employer's stable, and while doing so was bitten by a cat belonging to the stable and was seriously injured. Upon an application for compensation under the Workmen's Compensation Act, 1906 :—

Held, that the accident arose out of and in the course of his employment. ROWLAND *v.* WRIGHT - - - - - - **C. A. 963**

4. —— *Compensation — Dependant — Posthumous Illegitimate Child—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *ss.* 1, 13.

A posthumous illegitimate child of a workman may be a dependant within the Workmen's Compensation Act, 1906.

Accordingly, where a workman was killed by an accident arising out of and in the course of his employment some months before the birth of an illegitimate child, the paternity of which he admitted, and it was proved that he was engaged to be married to the mother and intended to provide for the maintenance of the child, and the accident occurred very shortly before the date fixed for the solemnization of the marriage :—

Held, applying the principle of *Williams* v. *Ocean Coal Co., Ld.*, [1907] 2 K. B. 422, that the child was entitled to compensation as a dependant. SCHOFIELD *v.* ORRELL COLLIERY COMPANY - - - - - - **C A. 178**

EMPLOYER AND WORKMAN—*continued.*

5. —— *Compensation—Infant Dependants—Agreement as to Amount of Compensation—Payment into Court—Approval of Registrar—Jurisdiction of County Court Judge — Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *Second Schedule, par.* 9 (*d*)—*Workmen's Compensation Rules*, 1907, *r.* 56A, *par.* 4—*Workmen's Compensation Rules*, 1908, *r.* 4.

Where a claim for compensation under the Workmen's Compensation Act, 1906, is made by dependants some of whom are infants and the employer admits liability, and some one on behalf of the infant dependants enters into a conditional agreement with the employer as to the amount of compensation, the agreement has no validity until it has come before the registrar of the county court, whose duty it is to consider it on behalf of the infants; but if the money is sent to the registrar for payment into Court under par. 4 of r. 56A of the Workmen's Compensation Rules, 1907, upon a præcipe according to Form 53A, and the registrar signifies his approval by signing a receipt for the money, the agreement becomes binding for all purposes, and the employer is freed from all further liability, and the county court judge has no jurisdiction to require his appearance in any further proceedings, e.g., proceedings as to the apportionment of the money in Court.

An agreement as to the amount of compensation payable to dependants under the Workmen's Compensation Act, 1906, ought not to be signed by the dependants' solicitor on their behalf. RHODES *v.* SOOTHILL WOOD COLLIERY COMPANY **C.A. 191**

6. —— *Compensation — Local Authority — Contract for Execution of Work undertaken by Principal—Municipal Corporation—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 4, *sub-s.* 1; *s.* 13.

A municipal corporation acquired for the purpose of a market a plot of land occupied by a ruinous building, and they accepted an offer by a contractor to purchase the building materials for 15*l.* on the terms of his pulling down the building and clearing the site. A workman employed by the contractor to do the work was killed by an accident arising out of and in the course of his employment, and his widow applied for compensation under the Workmen's Compensation Act, 1906, against both the contractor and the corporation:—

Held, that the contract between the corporation and the contractor was a contract for the execution of work undertaken by the corporation, and that it was entered into by them in the exercise and performance of their powers and duties, and consequently that the corporation were liable as principals under s. 4, sub-s. 1, of the Act. MULROONEY *v.* TODD - **C. A. 165**

7. —— *Compensation—Notice of Accident—Written Notice necessary—Failure to give Notice—Prejudice to Employer—Onus of Proof—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 2.

The notice of the accident which is to be given to the employer under s. 2, sub-s. 1, of the Workmen's Compensation Act, 1906, must be in writing. Under proviso (*a*) of sub-s. 1 the onus lies on the workman of shewing that his employer has not been "prejudiced in his defence by the want, defect or inaccuracy" of any such notice. HUGHES *v.* COED TALON COLLIERY COMPANY - - - - - - **C. A. 957**

8. —— *Compensation—Principal, Liability of—Execution by Contractor of Work undertaken by Principal—Shipping—Lighter—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 4, *sub-ss.* 1 *and* 4.

A limited company carried on the business of coal merchants in various parts of the world, including Cape Verd, and, as incidental to that business, the business of lightermen, and they purchased in England a lighter for use in their business at Cape Verd. By an agreement entered into between the company and G., G. agreed for a lump sum to navigate the lighter from England to Cape Verd and deliver her into the company's hands there, and to provide and pay for the crew, and the company agreed to pay all demands for insurance, also clearances at the port of departure. B., who was appointed by G. to take command of the lighter, engaged the crew. The boatswain, who was incapacitated by an accident on the voyage, applied against the company for compensation under the Workmen's Compensation Act, 1906:—

Held, that the company in the course or for the purposes of their business had contracted with G. for the execution by or under G. of part of the work undertaken by them and were liable as principals under s. 4, sub-s. 1, of the Act. DITTMAR *v.* OWNERS OF SHIP V 593 - **C.A. 389**

9. —— *Compensation — Ship — Ladder — Accident arising out of and in Course of Employment—Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1, *sub-s.* 1.

A fireman went ashore to procure necessaries not provided by the owners of the ship on which he was employed. On returning to the ship he fell off a ladder which was the only means of access to the ship and was drowned:—

Held by Cozens-Hardy M.R. and Farwell L.J. (Fletcher Moulton L.J. dissenting), that he went ashore for his own purposes and not on the ship's business, and that, inasmuch as he had not actually got back on board the vessel, the accident did not arise "out of and in the course of the employment" within the meaning of the Workmen's Compensation Act, 1906.

McDonald v. *Owners of Steamship Banana*, [1908] 2 K. B. 926, followed. MOORE *v.* MANCHESTER LINERS, LIMITED - - **C. A. 417**

10. —— *Compensation—Surgical Operation, Refusal to undergo—Discretion—Right to further Compensation — Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *s.* 1.

Where a workman refuses to undergo a reasonable and safe operation which will relieve or remove his incapacity, his continued inability to work at his trade is the result of his refusal of remedial treatment, and not the result of the original accident, and consequently he is not

EMPLOYER AND WORKMAN—*continued.*
entitled to further compensation under the Workmen's Compensation Act, 1906.
Rothwell v. *Davies*, (1903) 19 Times L. R. 423, explained and distinguished.
Decision of the majority of the judges in *Donnelly* v. *William Baird & Co., Ld.*, (1908) 45 Sc. L. R. 394, approved and adopted. WARNCKEN *v.* R. MORELAND & SON, LIMITED **C. A. 184**

11. *Compensation — Unemployment — Provision of Temporary Work—Contract of Service —Unemployed Workmen Act*, 1905 (5 *Edw.* 7, *c.* 18), *s.* 1, *sub-ss.* 3, 5, 7—*Workmen's Compensation Act*, 1906 (6 *Edw.* 7, *c.* 58), *ss.* 1, 13.
A man employed upon temporary work by the Central (Unemployed) Body for London under the provisions of the Unemployed Workmen Act, 1905, was killed by an accident arising out of and in the course of his employment. Upon granting his application for work the Central Body supplied him with a circular containing the conditions of employment :—
Held, that the deceased was a workman employed by the Central Body under a contract of service within the Workmen's Compensation Act, 1906, and that his widow was entitled to compensation. PORTON *v.* CENTRAL (UNEMPLOYED) BODY FOR LONDON - - **C. A. 173**

—— Perjury—Judicial proceedings—Arbitration under Workmen's Compensation Act, 1906 - - - - - - - **411**
See CRIMINAL LAW. 8.

—— Trade union.
See under TRADE UNION.

EMPTY BUILDING—Rates — Occupation — Intention to use when occasion requires **78**
See RATES. 2.

EQUITABLE EXECUTION.
See under EXECUTION.

ESTATE DUTY—Revenue.
See under REVENUE.

EVIDENCE—Admissibility—Prisoner in custody —Statement in reply to question put by police constable—Validity of conviction - - - - - - **692**
See CRIMINAL LAW. 3.

—— Bond, Action on — Acknowledgment in writing—Lost acknowledgment—Parol evidence - - - - - - **577**
See LIMITATION OF TIME.

—— Franchise—Objection—Evidence admissible before revising barrister - - **215**
See PARLIAMENT. 4.

—— Imputation on character of witness for prosecution — Cross-examination of person charged - - - - - **568**
See CRIMINAL LAW. 4.

—— Larks—"Recently taken" - - **629**
See WILD BIRDS.

EVIDENCE—*continued.*
—— Lodger franchise — Declaration — Prima facie evidence of claim — Rebutting evidence - - - - - - **348**
See PARLIAMENT. 2.

—— Subpœna not issued for purpose of obtaining relevant evidence—Setting aside—Jurisdiction - - - - - - **258**
See CRIMINAL LAW. 5.

EXCHANGE—Bill of.
See under BILL OF EXCHANGE.

EXECUTION—Bankruptcy—Mutual dealings—Set-off—Equitable execution—Receiver of debtor's interest in debenture stock
See BANKRUPTCY. 3. **430**

—— Equitable execution— Weekly payment by husband to wife - - - - **688**
See RECEIVER.

—— Sheriff—"Execution for a sum exceeding 20*l.*"—Contingent expenses - - **760**
See SHERIFF.

EXPENSES—Costs.
See under COSTS.

FACTORY—*Fencing of Machinery—Offence—Limitation of Time for laying Information—Factory and Workshop Act*, 1901 (1 *Edw.* 7, *c.* 22), *ss.* 10, 135, 146.
In May, 1905, and again on March 12, 1908, an inspector of factories for the district in which a factory of the respondents was situate visited the factory and found that the fly-wheel of an engine was not fenced as required by the Factory and Workshop Act, 1901. He again visited the factory on July 1, 1908, and found that the fly-wheel was still unfenced. On July 22, 1908, he laid an information against the respondents under s. 135 of the Act for that the factory was on July 1, 1908, not kept in conformity with the Act, in that the fly-wheel was not securely fenced as required by s. 10 of the Act :—
Held, that the information had been laid within three months after the date at which the offence charged in the information came to the knowledge of the appellant within s. 146 of the Act. VERNEY *v.* MARK FLETCHER & SONS, LIMITED - - - - - **Div. Ct. 444**

FEES.
See under COSTS.

FENCING—Machinery—Offence—Limitation of time for laying information - - **444**
See FACTORY.

FINANCE ACTS.
See under REVENUE.

FINE—Judgment summons—Default in appearance—Application of fine in reduction of judgment debt—Jurisdiction - **644**
See COUNTY COURT.

FIRE INSURANCE.
See under INSURANCE (FIRE).

FOOD AND DRUGS—Sale of—Adulteration.
See under ADULTERATION.

FOREIGN LEGISLATURE — Act of — Street improvement — Contribution — Action in England - - - - - 1
See INTERNATIONAL LAW.

FRANCHISE.
See under PARLIAMENT.

FRAUD—Husband and wife—Fraud by wife—Tort committed during coverture—Subsequent decree of judicial separation—Husband's liability - - - **880**
See HUSBAND AND WIFE.

FREIGHT — Ship — Charterparty— Lien — Demurrage, payable day by day — "Charges"—Dead freight - - **948**
See SHIPPING. 1.

GOODS—Sale of.
See under SALE OF GOODS.

GREAT WESTERN RAILWAY COMPANY (RATES AND CHARGES) ORDER CONFIRMATION ACT, 1891 - 604
See RAILWAY. 1.

HACKNEY CARRIAGE—*Breach by Driver of Regulations for enforcing Order at Standings—Offence against Statute—Incorporation of Statute—Effect of Repeal of Section—London Hackney Carriages Act*, 1843 (6 & 7 *Vict. c.* 86), *s.* 29—*London Hackney Carriages Act*, 1850 (13 & 14 *Vict. c.* 7), *ss.* 4, 8—*London Hackney Carriages Act*, 1853 (16 & 17 *Vict. c.* 33), *s.* 19—*Statute Law Revision Act*, 1874 (*No.* 2) (37 & 38 *Vict. c.* 96), *s.* 1 ; *Schedule.*

Where a statute gives power to an authority to make regulations, a breach of the regulations so made is an offence against the provisions of the statute.

A breach of regulations made under s. 4 of the Hackney Carriages Act, 1850, for enforcing order at standings for hackney carriages, is subject to the penalty of 40*s.* provided by s. 19 of the Hackney Carriage Act, 1853, for offences against that Act ; inasmuch as the effect of s. 21 of the Act of 1853, which provides that the Acts of 1850 and 1853 are to be construed as one Act, is that s. 4 of the Act of 1850 has the same operation as if it were in fact contained in the Act of 1853, and therefore an offence against regulations made under s. 4 of the Act of 1850 is an offence against the Act of 1853.

Quære whether the effect of s. 8 of the Hackney Carriages Act, 1850, which provides that that Act is to be construed as one Act with the Hackney Carriages Act, 1843, is to make the penalty provided by s. 29 of the Act of 1843 for disobedience by the driver of a hackney carriage of regulations made under that section applicable to a breach by him of regulations of a different kind made by virtue of s. 4 of the Act of 1850, which imposes no penalty for a breach thereof.

Semble, the Statute Law Revision Act, 1874, which partially repeals s. 29 of the London Hackney Carriages Act, 1843, does not, so far as the London Hackney Carriages Act, 1850, is concerned, affect the operation of s. 29 of the Act of 1843. WILLINGALE *v.* NORRIS **Div. Ct. 57**

HACKNEY CARRIAGE—*continued.*

HIGHWAY—*Light Locomotive—Vehicle under five tons in weight unladen, propelled by Mechanical Power—Person employed to accompany Locomotive—Exemption from Restrictions—Locomotives on Highways Act*, 1896 (59 & 60 *Vict. c.* 36), *s.* 1, *sub-s.* 1 ; *s.* 6, *sub-ss.* 1, 2—*Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 5, *sub-ss.* 1, 5 ; *s.* 17, *sub-s.* 2—*Motor Car Act*, 1903 (3 *Edw.* 7, *c.* 36), *s.* 12, *sub-s.* 1 ; *s.* 20, *sub-ss.* 1, 3—*Heavy Motor Car Order*, 1904, *arts.* 2, 3.

The effect of art. 3 of the Heavy Motor Car Order, 1904, is that a vehicle propelled by mechanical power, if it is under five tons in weight unladen, is a light locomotive within the meaning of the Locomotives on Highways Act, 1896, s. 1, sub-s. 1. Therefore a person cannot be convicted under s. 5, sub-s. 1 (*b*), of the Locomotives Act, 1898, for not having three men in attendance on the locomotive, inasmuch as by s. 17, sub-s. 2, of the Act of 1898 nothing in that Act is to affect light locomotives within the meaning of the Act of 1896. EVANS *v.* NICHOLL - - - - - **Div. Ct. 778**

2. —— *Repair — Extraordinary Traffic — Extraordinary Expenses—Limitation of Time for bringing Action—Damage resulting from Building Contract—"Completion of Contract"—Highways and Locomotives (Amendment) Act*, 1878 (41 & 42 *Vict. c.* 77), *s.* 23—*Locomotives Act*, 1898 (61 & 62 *Vict. c.* 29), *s.* 12, *sub-s.* 1 (*b*).

In s. 12, sub-s. 1 (*b*), of the Locomotives Act, 1898, which provides that proceedings for the recovery of expenses of extraordinary traffic, "where the damage is the consequence of any particular building contract, or work extending over a long period, shall be commenced not later than six months after the completion of the contract or work," the term "building contract" means a contract for the building of any physical construction and the term "completion of the contract" means completion so far as concerns the constructional work comprised therein ; and, where the constructional work consists of several component parts so closely connected that each would be useless without the others, the period of six months begins to run from the completion of the whole work, notwithstanding that the damage to the roads may have been caused exclusively by the haulage of materials in connection with some or one only of the component parts of the work.

Quære whether different considerations may not apply to contracts comprising several independent works ; also to contracts comprising work in several different districts where it is shewn that all the work within the district of the plaintiff authority has been completed more than six months before the commencement of the action.

Accordingly, where the work comprised in a contract included the construction of a reservoir and the laying of a line of pipes therefrom within the plaintiffs' district, and damage was

HIGHWAY—*continued.*
caused to the roads of the district by haulage in connection with the laying of the pipes, but not in connection with the construction of the reservoir :—

Held, that the contract was a building contract for one compound work, which was a work extending over a long period within the meaning of the sub-section, and that an action for recovery of expenses commenced more than six months after the completion of the line of pipes but before the completion of the reservoir was in time.

Lancaster Rural District Council v. *Fisher and Le Fanu*, [1907] 2 K. B. 516, explained and applied. CARLISLE RURAL DISTRICT COUNCIL *v.* CARLISLE CORPORATION - - **C. A. 471**

—— Railway company—Level crossing—Road raised on inclined planes—Repair of roadway - - - - - - **368**
See RAILWAY. 2.

HIRING AGREEMENT—With option to purchase—Bailee for hire—Right of owner to sue for arrears of rent after retaking possession - - - - - - **98**
See BAILMENT.

HOTEL—Innkeeper.
See under INNKEEPER.

HOUSE DUTY—Income tax—Premises let on lease - - - - - - - - **932**
See REVENUE. 2.

HUSBAND AND WIFE—*Fraud by Wife—Tort committed during Coverture—Subsequent Decree of Judicial Separation—Husband's Liability—Married Women's Property Act*, 1882 (45 *&* 46 *Vict. c.* 75), *s.* 1, *sub-s.* 2—*Matrimonial Causes Act*, 1857 (20 *&* 21 *Vict. c.* 85), *s.* 26.

The intention and effect of s. 26 of the Matrimonial Causes Act, 1857, is to put the wife for all civil purposes in the same position as if her husband were dead during all the time that the decree of judicial separation is in force, and, therefore, the pronouncement of the decree, after the commencement of an action against a husband and wife for the wife's tort, but before judgment, entitles the husband to be discharged from the action to which he was a party only for the sake of a rule of conformity which no longer applies to the woman who is being sued.

In an action against husband and wife for fraudulent representations by the wife after the marriage whereby the plaintiff sustained damage it appeared that the husband had no knowledge of or connection with the fraud, and that the wife had obtained a decree absolute for judicial separation from him after the commencement of the action but before judgment :—

Held, that upon the proper construction of s. 26 of the Matrimonial Causes Act, 1857, the husband was entitled to judgment.

Seroka v. *Kattenburg*, (1886) 17 Q. B. D. 177, and *Earle* v. *Kingscote*, [1900] 2 Ch. 585, criticized by Fletcher Moulton L.J. CUENOD *v.* LESLIE - - - - - - - **C. A. 880**

HUSBAND AND WIFE—*continued.*
—— Insurance by husband on wife's life—Insurable interest - - - - **805**
See INSURANCE (LIFE).

—— Married woman—Separate trading—Separate property—Receiving order—Jurisdiction - - - - - - **201**
See BANKRUPTCY. 2.

—— Receiver — Equitable execution — Weekly payment by husband to wife - **688**
See RECEIVER.

—— Separation deed, Action by trustee for wife under—Security for costs—"Nominal plaintiff" - - - - - - **50**
See PRACTICE. 2.

ILLEGITIMATE CHILD (POSTHUMOUS) — Workmen's compensation—Dependant **178**
See EMPLOYER AND WORKMAN. 4.

INCOME TAX.
See under REVENUE.

INEBRIATES ACT.
See under DRUNKENNESS.

INFANT — Workmen's compensation — Dependant—Posthumous illegitimate child **178**
See EMPLOYER AND WORKMAN. 4.

—— Workmen's compensation—Infant dependants—Payment into Court—Approval of registrar — Jurisdiction of county court judge - - - - - **191**
See EMPLOYER AND WORKMAN. 5.

INFORMATION — Factory — Fencing of machinery — Offence — Limitation of time for laying information - - **444**
See FACTORY.

INHABITED HOUSE DUTY — Income tax — Premises let on lease - - - **932**
See REVENUE. 2.

INNKEEPER—*Traveller—Cost of Accommodation defrayed by another Person—Loss of Property—Guest—Customary Liability of Innkeeper.*

Where a traveller is provided with accommodation and refreshment in an inn, the fact that the expenses thereof are by agreement between the innkeeper and another person to be paid for by that other person does not prevent the relation of innkeeper and guest from arising, and the innkeeper, therefore, incurs the customary liability for the safe custody of the traveller's goods in the inn. WRIGHT *v.* ANDERTON - - - - - - **Div. Ct. 209**

INSPECTION—Ship—Constructive total loss—Practice—Order to bring within jurisdiction - - - - - - **943**
See SHIPPING. 2.

INSTALMENTS—Stamp—Sale of goods, Agreement for—Price to be paid by instalments at stated periods - - **737**
See REVENUE. 4.

INSURANCE (ACCIDENT) — *Death caused by Accident—Intervening Cause—Disease directly caused by Accident.*

By the terms of a policy an accident insurance company undertook, if, at any time during the continuance of the said policy, the insured should sustain any bodily injury caused by violent, accidental, external, and visible means, then, in case such injury should, within three calendar months from the occurrence of the accident causing such injury, directly cause the death of the insured, to pay to the legal personal representatives of the insured the capital sum of 1000*l*. The policy contained the following proviso :—" Provided always and it is hereby as the essence of the contract agreed as follows: that this policy only insures against death where accident within the meaning of the policy is the direct or proximate cause thereof, but not where the direct or proximate cause thereof is disease or other intervening cause, even although the disease or other intervening cause may itself have been aggravated by such accident, or have been due to weakness or exhaustion consequent thereon, or the death accelerated thereby."

The assured, while hunting, had a heavy fall, and, the ground being very wet, he was wetted to the skin. The effect of the shock and the wetting was to lower the vitality of his system, and being obliged to ride home afterwards, while wet, still further lowered his vitality. The effect of this lowering of his vitality was to cause the subsequent development of pneumonia in his lungs of which he died. The pneumonia was not septic or traumatic, but arose as a direct and natural consequence from the fact that the diminution of vitality caused through the accident, as above mentioned, allowed the germs called " pneumococci," which in small numbers are generally present in the respiratory passages, to multiply greatly and attack the lungs : —

Held, affirming the judgment of Channell J., that the death of the assured was directly caused by accident within the meaning of the policy, and that the case did not come within the proviso therein, and the company were consequently liable on the policy. *In re* ETHERINGTON AND THE LANCASHIRE AND YORKSHIRE ACCIDENT INSURANCE COMPANY - - - **C. A. 591**

INSURANCE (FIRE)—Income tax—Covenant by lessor to pay fire insurance premium —Deduction - - - - **932**
See REVENUE. 2.

INSURANCE (LIFE) — *Husband and Wife—Insurance by Husband on Wife's Life—Insurable Interest — Life Assurance Act*, 1774 (14 *Geo.* 3, *c.* 48), *ss.* 1, 3—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 11.

A husband has as such an insurable interest in his wife's life ; and, therefore, it is not necessary in order to establish the validity of a policy of insurance effected by a husband upon the life of his wife to give affirmative evidence as to the existence and extent of a pecuniary interest of the husband in the life of his wife. The interest is presumed to the extent of the amount insured by the policy.

A husband and his wife effected with an insurance association a policy whereby, in consideration of a premium of which each paid part, a sum of money was made payable upon the death of whichever of them should die first to the survivor. The wife having died, the husband brought an action upon the policy to recover the policy money :—

Held, upon the footing that the policy was an insurance by the husband upon the life of the wife, that, notwithstanding the provisions of the Life Assurance Act, 1774, it was not necessary, in order to maintain the action, that the plaintiff should prove that he had any pecuniary interest in the life of his wife.

By Farwell L.J. and Kennedy L.J.: The policy might also be regarded as a valid insurance under the Married Women's Property Act, 1882, s. 11, by the wife of her own life expressed to be for the benefit of the husband, contingently on his surviving her. GRIFFITHS *v.* FLEMING **C. A. 805**

INSURANCE (MARINE)—" *Pirates*," *Meaning of in Policy—Seizure of Goods by Political Malcontents—*" *Warranted free of capture, seizure, and detention, piracy excepted.*"

Goods were shipped upon a vessel for carriage from a place at the mouth of the Amazon to a place far inland upon a tributary of a tributary of that river, situated in a remote territory belonging to Bolivia on the boundary between that country and Brazil. These goods were insured for the voyage by a policy in the form of a marine policy against, among other risks usually specified in such a policy, " pirates " and " all other perils " that should come to the hurt, detriment, or damage of the subject-matter of insurance. The policy contained the following clause : " Warranted free of capture, seizure, and detention, and the consequences thereof, or any attempt thereat, piracy excepted, and also from all consequences of riots, civil commotions, hostilities, or warlike operations, whether before or after declaration of war." The goods insured consisted of provisions and stores which belonged to the Bolivian Government, and were intended for Bolivian troops engaged in establishing the authority of that Government in the before-mentioned territory. Certain malcontents, mostly Brazilians, who were desirous that the authority of the Bolivian Government should not be established there, had fitted out an expedition which ascended the Amazon in armed vessels for the purpose of resisting the Bolivian troops and establishing an independent republic in the before-mentioned territory. Those on board one of these vessels stopped the vessel on which the goods insured were shipped and seized those goods. In an action on the policy claiming as for a loss through pirates :—

Held, affirming the decision of Pickford J., that, even assuming that the acts of those who seized the goods came within the legal definition of piracy for some purposes, the word " pirates," as used in the policy, must be construed in its popular sense, and in that sense it meant persons who plunder indiscriminately for their private gain, not persons who simply operate against the property of a particular

INSURANCE (MARINE)—*continued.*
State for a public political end, and, therefore, there had not been a loss through "pirates" within the meaning of the policy.

Held, also, that, having regard to the terms of the warranted free clause, the seizure of the goods could not be treated as coming within the general words "all other perils" as being ejusdem generis with piracy. REPUBLIC OF BOLIVIA *v.* INDEMNITY MUTUAL MARINE ASSURANCE COMPANY - - - - - - - **C. A. 785**

—— Ship—Order to bring within jurisdiction—Preservation—Inspection - - **943**
See SHIPPING. 2.

INTERNATIONAL LAW—*Act of Foreign Legislature—Local Statute—Street Improvement—Contribution—Remedy by Action—Action in England.*

An Act of the Legislature of New South Wales authorized the municipal council of the city of Sydney to carry out improvements in a certain street within that city and imposed upon the owners of property situate within the improvement area the liability to contribute towards the cost of the improvements. For the purpose of enforcing payment of contributions the council were empowered to distrain the goods of the owners liable to contribute and, in addition to the remedy by distress, to recover by action the amounts due and payable.

Being unable to recover by means of distress the amount of contribution due from an owner of property within the improvement area, the council brought an action in this country to recover the amount:—

Held, that the action would not lie in this country, on the grounds (1.) that, the liability being imposed by the foreign State solely for its own domestic purposes, the action to enforce it was analogous to an action to recover a penalty or a tax; (2.) that the action was one relating to real property situate abroad. SYDNEY MUNICIPAL COUNCIL *v.* BULL **Grantham J. 7**

INTERROGATORIES — Discovery — Action for slander—Defence of fair comment **239**
See PRACTICE. 1.

IRELAND—Poor law—Pauper "liable to be removed to Ireland" — Grounds of appeal - - - - - - - **454**
See POOR LAW. 2.

JOINDER—Railway and Canal Commission—Undue preference — Through rate — Joinder of defendants - - - **550**
See RAILWAY. 3.

JUDGMENT — Declaratory — Trade union — Restraint of trade—Action by member against society—Illegality - - **901**
See TRADE UNION. 2.

JUDGMENT SUMMONS—Default in appearance—Fine—Jurisdiction - - - **644**
See COUNTY COURT.

JUDICIAL SEPARATION.
See under SEPARATION.

JURISDICTION—Order to bring within jurisdiction—Ship—Constructive total loss—Preservation—Inspection - - **943**
See SHIPPING. 2.

—— Poor rate—Non-payment of—Application for distress warrant—Jurisdiction of justices to go behind rate - - **860**
See RATES. 1.

—— Receiving order.
See under RECEIVING ORDER.

—— Summary jurisdiction — Jurisdiction of justices to convict—"Before the charge is gone into" - - - - **849**
See JUSTICES.

—— Summary jurisdiction (married women)—Weekly payment by husband to wife—Equitable execution - - - **688**
See RECEIVER.

—— Workmen's compensation—Infant dependants—Payment into Court—Approval of registrar — Jurisdiction of county court judge - - - - - **191**
See EMPLOYER AND WORKMAN. 5.

JURY — Murder — Drunkenness—Manslaughter—Direction to jury - - - **895**
See CRIMINAL LAW. 7.

JUSTICES—*Summary Jurisdiction—Charge of Offence triable summarily — Evidence in course of hearing shewing Offence triable by Jury—Jurisdiction of Justices to convict—"Before the charge is gone into" — Summary Jurisdiction Act*, 1879 (42 & 43 *Vict. c.* 49), *s.* 17.

By s. 17, sub-s. 1, of the Summary Jurisdiction Act, 1879, "A person when charged before a Court of summary jurisdiction with an offence in respect of the commission of which an offender is liable on summary conviction to be imprisoned for a term exceeding three months . . . . may, on appearing before the Court, and before the charge is gone into but not afterwards, claim to be tried by a jury."

Sub-s. 2: "A Court of summary jurisdiction, before the charge is gone into in respect of an offence to which this section applies, for the purpose of informing the defendant of his right to be tried by a jury in pursuance of this section, shall address him" to the effect in the section set out, and ask him if he desires to be tried by a jury.

A woman was charged before justices with an offence, in respect of which, if it was a first offence, she was liable on summary conviction to be imprisoned for a term not exceeding three months. In the course of the hearing evidence was given by the prosecution that the defendant had been previously convicted of a like offence, and thereupon she became liable on conviction to be imprisoned for a term exceeding three months. The justices, without giving her the option prescribed by the above section, convicted the defendant and sentenced her to three months' imprisonment:—

Held by Walton and Jelf JJ. (Lord Alverstone C.J. dissenting), that the justices had no

JUSTICES—*continued.*
jurisdiction to treat the case as one of a first offence; that the words "before the charge is gone into" mean in such a case "before the charge in its altered character is proceeded with"; and that, as the justices had not, upon the evidence of the previous conviction being given, asked the defendant if she wished to be tried by a jury, the conviction was bad. THE KING *v.* BEESBY - - - - **Div. Ct. 849**

—— Adulteration — Certificate of analysis — Form of certificate - - - - **1**
See ADULTERATION.

—— Betting—Street betting—What amounts to
See STREET BETTING **774**

—— Copyright — Music — "Pirated copy of musical work"—Perforated music roll —Mechanical instrument - - **515**
See COPYRIGHT.

—— Cruelty to animals—Irregularity in form of summons - - - - - **626**
See CRIMINAL LAW. 2.

—— Dentist — Unregistered person — Description - - - - - - - **38**
See DENTIST.

—— Drunkard (Habitual)—Validity of sentence —Power to order imprisonment in addition to detention - - - **381**
See CRIMINAL LAW. 10.

—— Drunkenness—"Habitual drunkard" **632**
See DRUNKENNESS.

—— Drunkenness — Murder — Manslaughter — Direction to jury - - - - **895**
See CRIMINAL LAW. 7.

—— Evidence — Admissibility — Prisoner in custody—Statement in reply to question put by police constable — Validity of conviction - - - - - **692**
See CRIMINAL LAW. 3.

—— Evidence — Imputation on character of witness for prosecution - - **568**
See CRIMINAL LAW. 4.

—— Factory—Fencing of machinery—Offence —Limitation of time for laying information - - - - - **444**
See FACTORY.

—— Hackney carriage—Breach by driver of regulations for enforcing order at standings - - - - - - **57**
See HACKNEY CARRIAGE.

—— Locomotive (Light)—Person employed to accompany locomotive — Exemption from restrictions - - - - **778**
See HIGHWAY. 1.

—— London—"Building" — Reservoir authorized by special Act—Supervision of district surveyor - - - - **744**
See LONDON. 2.

JUSTICES—*continued.*
—— Motor car passing tramcar—Duty to pass on off side—"Carriage" - - **397**
See MOTOR CAR.

—— Overseers, Precept to — Appeal against apportionment — Change of overseers pending appeal—Liability of overseers to whom precept directed - - **768**
See LOCAL GOVERNMENT. 3.

—— Perjury—Judicial proceeding—Arbitration under Workmen's Compensation Act, 1906 - - - - - - - **411**
See CRIMINAL LAW. 8.

—— Poor law.
See under POOR LAW.

—— Poor rates.
See under RATES.

—— Probation of offenders — Recognizance — Condition as to abstention from intoxicating liquor - - - - - **892**
See CRIMINAL LAW. 9.

—— Rates.
See under RATES.

—— School attendance, Exemption from—Child employed in agriculture - - **613**
See EDUCATION.

—— Vagrancy — Incorrigible rogue — Sentence by quarter sessions—Appeal - **439**
See CRIMINAL LAW. 6.

—— Wild birds—"Recently taken"—Larks—Evidence - - - - - **629**
See WILD BIRDS.

LADDER—Ship—Workmen's compensation **417**
See EMPLOYER AND WORKMAN. 9.

LANDLORD AND TENANT — Income tax—Covenant by lessor to pay fire insurance premium—Deduction - - - **932**
See REVENUE. 2.

LARKS—"Recently taken"—Evidence - **629**
See WILD BIRDS.

LEASE—Landlord and tenant.
See under LANDLORD AND TENANT.

—— Mortgagor in possession, Lease by—Lease including land other than mortgaged land—Option to determine—Option to renew - - - - - - - **837**
See MORTGAGE.

LEVEL CROSSING—Road raised on inclined planes—Repair of roadway - - **368**
See RAILWAY. 2.

LICENSING ACTS — *Compensation Charge — Deduction from Rent—Date from which Unexpired Portion of Term is to be counted—Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 3; *Sched. II.*
The date at which the length of the "unexpired term" referred to in Sched. II. of the Licensing Act, 1904, is to be ascertained is

LICENSING ACTS—*continued.*
October 10, the date on which the compensation charge is payable by the licence-holder. LONDON COUNTY COUNCIL *v.* WATNEY, COMBE & CO. **Div. Ct. 637**

—— Income tax — Deductions — Profits of brewery—Tied licensed house—Compensation charge - - - - **711**
See REVENUE. 1.

LIEN—Ship—Charterparty—Demurrage, payable day by day—"Charges"—Dead freight - - - - - **948**
See SHIPPING. 1.

LIFE INSURANCE.
See under INSURANCE (LIFE)

LIGHTER—Shipping—Workmen's compensation **389**
See EMPLOYER AND WORKMAN. 8.

LIMITATION OF TIME—*Action on Bond—Acknowledgment in writing — Executor of Deceased Obligor—Joint and several Liability—Acknowledgment by Executor—"Party liable by virtue of such specialty"—Lost Acknowledgment—Parol Evidence—Civil Procedure Act*, 1833 (3 & 4 *Will.* 4, *c.* 42), *ss.* 3, 5.
The obligors of a bond bound themselves to pay the principal debt and interest thereon in these terms: "For which payment to be well and truly made we bind ourselves and each of us and the heirs, executors, and administrators of us and each of us and every of them jointly and severally":—
Held, that the executor of a deceased obligor was not thereby made jointly liable with the surviving obligors.
An acknowledgment in writing signed by the executor of a deceased obligor, who was at the date of his death jointly and severally liable with other obligors on a bond, is an acknowledgment of the several liability of the deceased obligor and not of the joint liability of the surviving obligors, and is not therefore as against the surviving obligors an acknowledgment by a party liable by virtue of the specialty within the meaning of s. 5 of the Civil Procedure Act, 1833, as interpreted by *Roddam* v. *Morley*, (1857) 1 De G. & J. 1, so as to take out of the operation of s. 3 of the Act an action founded on the joint liability of the surviving obligors.
Parol evidence is admissible to prove the contents of a written acknowledgment which has been lost. READ *v.* PRICE **Channell J. 577**

—— For laying information—Factory—Fencing of machinery—Offence - - **444**
See FACTORY.

—— Highway—Repair — Extraordinary traffic — Limitation of time for bringing action - - - - - - **471**
See HIGHWAY.

LIMITATIONS, STATUTE OF—*Simple Contract Debt—Acknowledgment — Unconditional Admission of Liability coupled with Expression of Hope to pay—Conditional or limited Promise.*
To an action for recovery of a debt due on a bill of exchange the defendant pleaded the Statute of Limitations. Shortly before the commencement of the action and after the time fixed by the statute had run, the defendant wrote, in answer to a formal demand for payment by the plaintiff's solicitors, "I admit I owe your client the sum of 210*l.* 5*s.* but I cannot meet this liability at the moment although I hope to call upon you within fourteen days to make a definite proposal for repayment of that amount with interest from date of loan":—
Held, that this was a sufficient acknowledgment to prevent the operation of the statute.
Tanner v. *Smart*, (1827) 6 B. & C. 603, and *Smith* v. *Thorne*, (1852) 18 Q. B. 134; 21 L. J. (Q.B.) 199, distinguished. COOPER *v.* KENDALL **C. A. 405**

LOCAL AUTHORITY—Workmen's compensation —Contract for execution of work undertaken by principal - - - **165**
See EMPLOYER AND WORKMAN. 6.

LOCAL GOVERNMENT — *Building — Conversion of Building into Dwelling-house—"New Building"—Breach of By-law—Right to remove, alter, or pull down Building—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 157, 159.
By s. 157 of the Public Health Act, 1875, every urban authority may make by-laws with respect to (inter alia) the structure of new buildings, and may further provide for the observance of such by-laws by enacting therein such provisions as they think necessary as to the power of such authority to remove, alter, or pull down any work begun or done in contravention of the by-laws. By s. 159, "For the purposes of this Act . . . . the conversion into a dwelling-house of any building not originally constructed for human habitation, or the conversion into more than one dwelling-house of a building originally constructed as one dwelling-house only, shall be considered the erection of a new building."
By-law 102 of the by-laws made by an urban council provided that "if any work to which any of the by-laws relating to new streets and buildings may apply be begun or done in contravention of any such by-law, the person by whom such work shall be so begun or done, by a notice in writing . . . . shall be required . . . . to shew sufficient cause why such work shall not be removed, altered, or pulled down. If such person shall fail to shew sufficient cause . . . . the council shall be empowered, subject to any statutory provision in that behalf, to remove, alter, or pull down such work."
The owner of a building, which was not originally constructed for human habitation, converted it by structural alterations into a dwelling-house. The building did not comply with the by-laws relating to new buildings made by the urban council of the district within which the building was situated. The urban council, after due notice to the owner, pulled down the whole building:—
Held, that the whole building when so converted became, by virtue of s. 159 of the Public Health Act, 1875, a new building subject to the

LOCAL GOVERNMENT—*continued.*

by-laws relating thereto, and as it did not comply with the requirements of those by-laws the urban council had power to pull down the whole building, and not merely the actual work of conversion. HANRAHAN *v.* LEIGH-ON-SEA URBAN DISTRICT COUNCIL - - **Div. Ct. 263**

2. —— *Local Inquiry—Person appointed by County Council — Remuneration — "Expenses" —Liability of District Council—Local Government Act*, 1894 (56 & 57 *Vict. c.* 73), *s.* 72, *sub-s.* 4.

Sect. 72, sub-s. 4, of the Local Government Act, 1894, provides that where a county council hold a local inquiry under that Act or under the Local Government Act, 1888, on the application of any inhabitant of a district, the expenses incurred by the county council in relation to the inquiry (including the expenses of any committee or person authorized by the county council) shall be paid by the council of that district :—

Held, that a district council is not liable under that section to pay for the remuneration of a barrister appointed by a county council to hold a local inquiry under s. 57 of the Local Government Act, 1888. MIDDLESEX COUNTY COUNCIL *v.* KINGSBURY URBAN DISTRICT COUNCIL - - - - - - **C. A. 554**

3. —— *Rural District Council — Special Expenses—Precept to Overseers—Appeal against Apportionment—Change of Overseers pending Appeal—Liability of Overseers to whom Precept directed—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 229, 230.

A rural sanitary authority made an apportionment under s. 229 of the Public Health Act, 1875, of the special expenses of a drainage scheme among certain contributory places in their district, including the parish of B., and issued to the respondents, who at that time were the overseers of B., a precept for the amount of the contribution payable by that parish. The respondents appealed to the Local Government Board against the apportionment. While the appeal was still pending a summons was issued against the respondents for non-payment of the amount of the precept, and the justices adjourned the hearing until the appeal should be decided. The Local Government Board eventually confirmed the apportionment, but in the interval the respondents had gone out of office as overseers. On the summons coming on for hearing the justices refused to issue their distress warrant against the respondents for the amount of the precept :—

Held, that they had jurisdiction to do so. PLYMPTON ST. MARY RURAL DISTRICT COUNCIL *v.* REYNOLDS - - **Div. Ct. 768**

—— School — Water, Supply of — Liability of local education authority - - **824**
See SCHOOLS.

LOCOMOTIVES — Highway — Repair — Extraordinary traffic—Limitation of time for bringing action - - - - **471**
See HIGHWAY. 2.

LOCOMOTIVES—*continued.*

—— Light locomotive — Person employed to accompany locomotive — Exemption from restrictions - - - - **778**
See HIGHWAY. 1.

LODGER FRANCHISE.
See under PARLIAMENT.

LONDON—*Buildings—General Line of Buildings—Buildings erected beyond the General Line —Consent of the Metropolitan Board of Works— Alteration of General Line of Buildings—Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 75 (*repealed*)—*London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*), *ss.* 22, 27, 216.

The superintending architect of metropolitan buildings appointed under s. 136 of the London Building Act, 1894, in defining the general line of buildings under s. 22 of that Act, may take into account structures actually existing which were erected before the passing of that Act, with the consent of the Metropolitan Board of Works, beyond the general line of buildings as it existed at the date of the consent. The erection of such structures may have had the effect of altering the general line of buildings as it existed at that date. The question whether it has done so is a question of fact for the superintending architect or other tribunal which has to decide it.

The superintending architect was called upon to define the general line of buildings in a part of a certain road in the metropolis in the following circumstances :—Along the part of the road in question stood a number of old houses built before the year 1862. In front of these houses and between them and the pavement line of the road were originally forecourts or open spaces. By s. 75 of the Metropolis Management Amendment Act, 1862 (now repealed by the London Building Act, 1894, and replaced by ss. 22 and 170 of that Act), it was provided that no structure should without the consent in writing of the Metropolitan Board of Works be erected beyond the general line of buildings or within fifty feet of the highway ; and any structure erected without such consent was liable to be demolished as therein provided. At the date of the application to the superintending architect there had been erected upon the forecourts or open spaces in front of the old houses a number of shops of one storey projecting from the fronts of the old houses up to the pavement line of the road in question. Some of these shops had been erected with the consent of the Metropolitan Board of Works ; as to one of them it was proved that the consent of the board had been applied for and refused, and as to the others there was no evidence that the consent of the board had ever been applied for or granted.

The superintending architect certified that the frontage line of the old houses was the general line of buildings. On appeal from this decision under s. 25 of the London Building Act, 1894, to the tribunal of appeal constituted under s. 175 of the Act, that tribunal fixed as the general line of buildings the frontage line of the shops erected on the forecourts or open spaces in front of the old houses.

On a case stated for the opinion of the High Court under s. 182 of the Act :—

LONDON—*continued.*

Held, that there was nothing in point of law in these circumstances to prevent the tribunal of appeal from so deciding.

By s. 27 of the London Building Act, 1894, the consent of the London County Council to the erection of any structure beyond the general line of buildings in any part of a street shall not be deemed to affect or alter in that or any other part of the street the general line of buildings as existing at the time of the consent.

By s. 216 of the Act all consents given under any Act repealed by that Act are to have the same validity and effect as if they had been given under that Act :—

Held, that the effect of s. 216 was to legalize buildings erected by consent of the Metropolitan Board of Works under the Metropolis Management Amendment Act, 1862, but not to alter the effect which the erection of buildings in accordance with the consent of the board might have upon the general line of buildings as existing at the date of the consent. LONDON COUNTY COUNCIL *v.* METROPOLITAN RAILWAY COMPANY - - - - - **Div. Ct. 116**

2. —— "*Building*"—*Reservoir authorized by Special Act—Supervision of District Surveyor—London Building Act*, 1894 (57 *&* 58 *Vict. c. ccxiii.*), *ss.* 138, 145, 154.

By s. 138 of the London Building Act, 1894, "subject to the provisions of this Act and to the exemptions in this Act mentioned, every building or structure, and every work done to, in, or upon any building or structure . . . . shall be subject to the supervision of the district surveyor appointed to the district in which the building or structure is situate." By s. 145 notice is to be given to the district surveyor by the builder or other person causing or directing the work to be executed, when a building or structure or work is about to be begun ; and by s. 154 certain fees are payable by the builder, or in his default by the owner or occupier of the building or structure, to the district surveyor.

A water company was empowered by a special Act to make and maintain in the lines and situation and according to the levels shewn on the deposited plans and sections the reservoirs, lines of pipes, and other works thereinafter described, with all proper wells, filtering beds, and other appliances for collecting, filtering, storing, and distributing water. The company constructed, under the powers of the Act, two covered storage reservoirs in the metropolitan district of the cubical extent of 2,900,000 cubic feet and 2,769,000 cubic feet respectively. The reservoirs had a flooring of concrete, with walls of brickwork backed by concrete and earth, and were covered in by a series of brick arches supported by brick piers twenty feet high. The brick arches were covered with a layer of concrete with earth on top. The reservoirs in some portion projected above the surface of the ground :—

Held, that the reservoirs were "buildings or structures" within the meaning of the above sections of the London Building Act, 1894 ; that the application of those sections was not inconsistent with the provisions of the special Act ;

LONDON—*continued.*

and that therefore it was the duty of the district surveyor to supervise the construction of the reservoirs, and that he was entitled to his fees for such supervision. MORAN & SON, LIMITED *v.* MARSLAND - - - - **Div. Ct. 744**

—— Hackney carriages.
See under HACKNEY CARRIAGE.

—— Poor rate—Railway company—Reduction of value of railway through competition of tramways and tube railways - **274**
See RATES. 3.

MAGISTRATES.
See under JUSTICES.

MAINTENANCE—Bastardy—Death of mother
See BASTARDY. **564**

MANDAMUS—Poor rate—Railway company—Mandamus to assessment committee to appoint valuer - - - - **274**
See RATES. 3.

MANSLAUGHTER — Murder — Drunkenness — Direction to jury - - - **895**
See CRIMINAL LAW. 7.

MARGARINE—Butter and Margarine Act, 1907.
See under ADULTERATION.

MARINE INSURANCE.
See under INSURANCE (MARINE).

MARRIED WOMAN.
See under HUSBAND AND WIFE.

MASTER AND SERVANT.
See under EMPLOYER AND WORKMAN.

MATRIMONIAL CAUSES — Tort committed during coverture—Subsequent decree of judicial separation—Husband's liability
See HUSBAND AND WIFE. **880**

METROPOLIS.
See under LONDON.

MORTGAGE—*Lease by Mortgagor in possession—Lease including Land other than Mortgaged Land—Option to determine—Option to renew—Conveyancing and Law of Property Act*, 1881 (44 *&* 45 *Vict. c.* 41), *s.* 18.

A lease made under the provisions of s. 18 of the Conveyancing and Law of Property Act, 1881, by a mortgagor in possession is valid as against the mortgagee notwithstanding that it contains an option for the lessee to determine the lease before, or to renew the lease after, the determination of the term.

But if the demised premises include land other than the mortgaged land, and one inclusive rent only is reserved, the lease is invalid as against the mortgagee. A deed of apportionment subsequently executed between the mortgagor and his lessee apportioning the rent as between the several parcels does not validate such a lease as against the mortgagee. KING *v.* BIRD
Bucknill J. 837

MOTOR CAR — *Tramcar proceeding in same Direction—Motor Car passing Tramcar—Duty to pass on off side—"Carriage"—Motor Cars (Uses and Construction) Order*, 1904, *arts.* 1, 4 (3.).

By art. 1 of the Motor Cars (Uses and Construction) Order, 1904, "In this order the expression 'carriage' includes a waggon, cart, or other vehicle." By art. 4, "Every person driving or in charge of a motor car when used on any highway shall comply with the regulations hereinafter set forth; namely . . . . (3.) He shall, when meeting any carriage, horse, or cattle, keep the motor car on the left or near side of the road, and when passing any carriage, horse, or cattle proceeding in the same direction, keep the motor car on the right or off side of the same."

A tramcar running on tramway rails in a highway is a "carriage" within the meaning of the above order, and therefore a motor car, when passing a tramcar proceeding in the same direction, must pass it on the right or off side thereof. BURTON *v.* NICHOLSON - - **Div. Ct. 397**

—— Highway—Light locomotive—Person employed to accompany locomotive—Exemption from restrictions - **778**
See HIGHWAY. 1.

MOTOR CAR (HEAVY) ORDER, 1904, arts. 2, 3
See HIGHWAY. 1. **778**

MOTOR CARS (USES AND CONSTRUCTION) ORDER, 1904, arts. 1, 4 (3.) - **397**
See MOTOR CAR.

MUNICIPAL ELECTIONS (CORRUPT AND ILLEGAL PRACTICES) ACT - **342**
See PARLIAMENT. 1.

MURDER — Drunkenness — Manslaughter — Direction to jury - - - - **895**
See CRIMINAL LAW. 7.

MUSIC—"Pirated copy of musical work"—Perforated music roll — Mechanical instrument - - - - - **515**
See COPYRIGHT.

MUTUAL DEALINGS — Set-off — Company — Receiver of debtor's interest in debenture stock - - - - **430**
See BANKRUPTCY. 3.

NEGLIGENCE — Common employment—Negligence of fellow servants - - **530**
See EMPLOYER AND WORKMAN. 1.

NOTICE — Bankruptcy — Appeal, Notice of — Time for entering an appeal—Extending time - - - - - **103, 105, n.**
See BANKRUPTCY. 4, 5.

——Poor law—Removal order—Notice of appeal—Validity — Entry of appeal at next sessions - - - - - - **463**
See POOR LAW. 3.

—— Workmen's compensation — Notice of accident — Written notice necessary
See EMPLOYER AND WORKMAN. 7. **957**

OCCUPATION—Rates—Empty building—Intention to use when occasion requires **78**
See RATES. 2.

OFFENCES—Criminal law.
See under CRIMINAL LAW.

OPTION—Lease by mortgagor in possession—Lease including land other than mortgaged land—Option to determine—Option to renew - - - - **837**
See MORTGAGE.

OVERSEER—Poor law—Solicitor—Exemption—Appeal to quarter sessions—Costs—Writ of privilege - - - - **449**
See POOR LAW. 1.

—— Special expenses—Precept to overseers—Appeal against apportionment—Change of overseers pending appeal - - **768**
See LOCAL GOVERNMENT. 3.

PARLIAMENT — *Franchise—Borough Vote—Bribery by Agents at Municipal Election—Report by Municipal Election Court—Corrupt and Illegal Practices Prevention Act*, 1883 (46 & 47 *Vict. c.* 51), *s.* 6, *sub-s.* 3 (*a*); *s.* 38, *sub-s.* 5—*Municipal Elections (Corrupt and Illegal Practices) Act*, 1884 (47 & 48 *Vict. c.* 70), *s.* 2; *s.* 3, *sub-s.* 2; *s.* 23.

If a candidate at a municipal election is reported by an election Court to have been guilty by his agents of a corrupt practice at the election, the effect of the report is that he is not capable of being elected to or holding any corporate office in the borough during a period of three years from the date of the report, and if he has been elected his election is void, but he is not deprived of his right to vote at a parliamentary election, inasmuch as the case is governed by s. 3, sub-s. 2, of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884.

Sect. 6, sub-s. 3 (*a*), and s. 38, sub-s. 5, of the Corrupt and Illegal Practices Prevention Act, 1883, extended to municipal elections by ss. 2 and 23 of the Municipal Elections (Corrupt and Illegal Practices) Act, 1884, which disqualify the person so reported from voting at a parliamentary election during a period of seven years from the date of the municipal election, apply only where the person reported has been personally guilty of a corrupt practice. MORRIS *v.* SHREWSBURY TOWN CLERK - **Div. Ct. 342**

2. —— *Franchise—Borough Vote—Lodger Franchise—Declaration—Prima facie Evidence of Claim—Rebutting Evidence—Relationship between Lodger and Landlord—Parliamentary Registration Act*, 1843 (6 & 7 *Vict. c.* 18), *ss.* 38, 39—*Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 23.

The prima facie evidence of the qualification of a person claiming to vote as a lodger, constituted under s. 23 of the Parliamentary and Municipal Registration Act, 1878, by the declaration annexed to the claimant's notice of claim, is not rebutted by the mere fact that the claimant's landlord is his father. MAJOR *v.* SHREWSBURY TOWN CLERK - - - - **Div. Ct. 348**

PARLIAMENT—*continued.*

3. —— *Franchise—Rating—Successive Occupation—Representation of the People Act*, 1832 (2 & 3 *Will.* 4, *c.* 45), *ss.* 27, 28, 30—*Representation of the People Act*, 1867 (30 & 31 *Vict. c.* 102), *ss.* 3, 26, 56, 59—*Poor Law Amendment Act*, 1868 (31 & 32 *Vict. c.* 122), *s.* 38.

The appellant, who was on the occupation list of voters, was the inhabitant occupier, during the whole of the qualifying period from July 15, 1907, to July 15, 1908, of two dwelling-houses in immediate succession. He occupied the first house until June, 1908, when he went into occupation of the second house. He was rated and paid all the rates due in respect of the first house, but inasmuch as the building of the second house was not completed in April, 1908, when the rate for the half-year ending September 29, 1908, was made, the house was not entered in the rate-book, and no one was rated in respect thereof until after the termination of the qualifying period, and no claim to be rated in respect thereof nor tender or payment under s. 30 of the Representation of the People Act, 1832, of the sum which would have been due had he been rated was ever made by the appellant:—

Held, that the appellant was not entitled to the franchise under ss. 3 and 26 of the Representation of the People Act, 1867. PITTS *v.* MICHELMORE - - - - **Div. Ct. 227**

4. —— *Occupation Franchise — Objection — Prima facie Proof of Ground of Objection—Evidence admissible before Revising Barrister—Houses similarly occupied—Parliamentary and Municipal Registration Act*, 1878 (41 & 42 *Vict. c.* 26), *s.* 28, *sub-s.* 10.

At a court held by a revising barrister objection was taken to the names of certain persons being retained in division 1 of the occupiers' list for a borough on the ground in each case that they had not occupied as owner or tenant the premises named in the list for twelve months immediately preceding July 15 in the year. The objector proved as to each of the persons objected to—(1.) that the dwelling-house in respect of which he claimed to be placed on the list formed part of a house which was itself a house of the description known as an ordinary dwelling-house; (2.) that the landlord or landlady to whom he paid rent also resided in the house; and (3.) that the landlord or landlady was rated and paid the rates for the whole house as a separate tenement. The revising barrister then examined the assistant overseer and the registration clerk for the borough as to the conditions of letting, in the majority of cases in the borough, of houses of the same description as those occupied by the persons objected to:—

Held, that the revising barrister, if he believed that the proof of the three facts above stated applied to the particular house and occupation as to which the objection was taken, ought then to have inquired into the circumstances of the occupation in that particular case; he must not, as he had done in the present case, act upon general evidence with regard to the majority of houses similarly occupied in the borough, and he must therefore be directed to complete the revision.

PARLIAMENT—*continued.*

It is always for the revising barrister to judge whether the evidence brought before him on behalf of the objector (which may not be strictly legal evidence) is prima facie proof or not of the ground of objection. KENT *v.* FITTALL (No. 3) - - - - **Div. Ct. 215**

—— Rateability of owner — Parliamentary borough—Tenement wholly let out in apartments as lodgings — Representation of the People Act, 1867 - - **133**
See RATES. 4.

PARLIAMENTARY AND MUNICIPAL REGISTRATION ACT, 1878 - - - **215**
See PARLIAMENT. 4.

PAROL EVIDENCE.
See under EVIDENCE.

PAUPER.
See under POOR LAW.

PERJURY — Judicial proceeding — Arbitration under Workmen's Compensation Act, 1906 - - - - - - **411**
See CRIMINAL LAW. 8.

"**PIRATES**"—Meaning of in policy—Seizure of goods by political malcontents - **785**
See INSURANCE (MARINE).

POLICY—Insurance.
See under INSURANCE (ACCIDENT), INSURANCE (FIRE), INSURANCE (LIFE), and INSURANCE (MARINE).

POOR LAW—*Overseer—Solicitor—Exemption—Appeal to Quarter Sessions—Costs—Writ of Privilege—Poor Relief Act*, 1601 (43 *Eliz. c.* 2), *s.* 5.

A practising solicitor is exempt from serving the office of overseer of the poor, and if he is appointed to the office by a district council he is entitled to appeal to quarter sessions for an order to quash the appointment; but if the district council do not appear on the appeal to oppose the solicitor's claim to exemption, quarter sessions have no power to order the district council to pay the costs of the appeal. THE KING *v.* DERBYSHIRE JUSTICES. *Ex parte* NEW MILLS URBAN DISTRICT COUNCIL - - **Div. Ct. 449**

2. —— *Removal of Pauper from England to Ireland—Order of Justices made on erroneous Statements of Fact—Appeal by Guardians of Union in Ireland to which Pauper ordered to be removed—Grounds of Appeal—Pauper "liable to be removed to Ireland"—Poor Removal Act*, 1845 (8 & 9 *Vict. c.* 117), *s.* 2—*Poor Removal (No.* 2) *Act*, 1861 (24 & 25 *Vict. c.* 76), *s.* 2—*Poor Removal Act*, 1863 (26 & 27 *Vict. c.* 89), *s.* 7.

The right of appeal to quarter sessions conferred upon the guardians of any union in Ireland by s. 7 of the Poor Removal Act, 1863, from an order of justices made under s. 2 of the Poor Removal Act, 1845, and s. 2 of the Poor Removal (No. 2) Act, 1861, ordering that a pauper be removed from England to the union in Ireland is limited to one of two grounds. The appellants must shew either that the pauper was

POOR LAW—*continued.*
legally settled in some parish in England or was not in law liable to be removed to Ireland. Therefore where a pauper is admittedly liable to be removed to some union in Ireland, but is not removable to that union to which the justices (acting upon erroneous statements of fact by the pauper) have ordered her to be removed, a Court of quarter sessions will not, on appeal by the guardians of the union to which the pauper is so ordered to be removed, set aside the removal order. LOCAL GOVERNMENT BOARD OF IRELAND *v.* BLACKBURN GUARDIANS **Div. Ct. 454**

3. —— *Removal Order—Notice of Appeal—Validity—Entry of Appeal at next Sessions—Jurisdiction of subsequent Sessions—Poor Relief Act*, 1662 (13 *&* 14 *Car.* 2, *c.* 12), *ss.* 1, 2—*Poor Law Amendment Act*, 1834 (4 *&* 5 *Will.* 4, *c.* 76), *s.* 81—*Poor Law Procedure Act*, 1848 (11 *&* 12 *Vict. c.* 31), *s.* 9.

On February 26, 1908, an order of removal of a pauper and her child from the Wayland Union to the Forehoe Union was made. Both unions are in the county of Norfolk. On March 31, 1908, the Forehoe Union gave notice of appeal against the order. The notice did not mention any sessions as those to which it was intended to appeal. On April 8 a Court of quarter sessions for the county of Norfolk was held, but no appeal against the order of removal was entered for those sessions. The succeeding quarter sessions were held on July 1, 1908, and the appeal against the order was entered for those sessions. The parties treated the notice of appeal as being given for those sessions :—

Held, that the sessions of July 1, 1908, had jurisdiction to hear the appeal and to decide whether it had been entered at the next practicable sessions so as to comply with the requirements of the Poor Relief Act, 1662, s. 2.

Held, further, that as the parties treated the notice of appeal as having been given for the sessions of July 1, 1908, the objection could not be taken that it applied only to the sessions of April 8. THE KING *v.* NORFOLK JUSTICES. *Ex parte* WAYLAND UNION - - **Div. Ct. 463**

—— Rates.
See under RATES.

—— Rating—Franchise—Representation of the People Acts, 1832 and 1867 - - - **227**
See PARLIAMENT. 3.

POOR RATE.
See under RATES.

POSTHUMOUS ILLEGITIMATE CHILD—Workmen's Compensation—Dependant **178**
See EMPLOYER AND WORKMAN. 4.

PRACTICE—*Discovery—Interrogatories—Action for Slander—Defence of Fair Comment.*

The defendant in an action for slander, alleged to have been uttered in a speech made by him as chairman at a licensing meeting, pleaded a defence of fair comment in the following terms : "In so far as the words complained of consist of statements of fact the same are in their natural and ordinary signification true in substance and in fact. In so far as they consist of comment the same are fair and bona fide comment upon matters of public interest." There was no plea of justification. Upon an application by the defendant for leave to administer interrogatories to the plaintiffs directed to proving the truth of the statements of fact in his speech and in the particulars delivered by him of the materials upon which his defence of fair comment was based :—

Held, that the defendant was entitled, notwithstanding the absence of a plea of justification, to administer interrogatories with the object of obtaining admissions of the truth of the material statements of fact in the speech and particulars alleged to be defamatory. PETER WALKER & SON, LIMITED *v.* HODGSON - - **C.A. 239**

2. —— *Security for Costs—Action by Trustees for Wife under Separation Deed—"Nominal Plaintiff."*

Where trustees, to whom, by a covenant in a separation deed, a husband had covenanted to pay an annuity in trust for his wife, sued for arrears under that covenant :—

Held, that the plaintiffs were not mere "nominal plaintiffs" within the rule as to giving security for costs, and, therefore, an order for security for costs could not be made against them on the ground that they were, if unsuccessful, without means of paying costs.

Greener v. *E. Kahn & Co.*, [1906] 2 K. B. 374, discussed. WHITE *v.* BUTT - **C.A. 59**

—— Joinder of defendants — Railway and Canal Commission—Undue preference —Through rate - - - - **550**
See RAILWAY. 3.

—— Ship — Constructive total loss — Subject-matter of action—Order to bring within jurisdiction—Preservation—Inspection
See SHIPPING. 2. **943**

PRESENT—Right of prisoner to be present—Court of Criminal Appeal - - **200**
See CRIMINAL LAW. 1.

PRINCIPAL — Workmen's compensation — Execution by contractor of work undertaken by principal—Liability of principal - - - - - - **389**
See EMPLOYER AND WORKMAN. 8.

PRINCIPAL AND AGENT—Workmen's compensation—Contract for execution of work undertaken by principal - **165**
See EMPLOYER AND WORKMAN. 6.

PRIVATE INTERNATIONAL LAW.
See under INTERNATIONAL LAW.

PRIVILEGE, WRIT OF—Solicitor—Overseer—Exemption—Appeal to quarter sessions —Costs - - - - - **449**
See POOR LAW. 1.

PROBATION OF OFFENDERS — Release on probation—Recognizance—Condition as to abstention from intoxicating liquor
See CRIMINAL LAW. 9. **892**

PROMISSORY NOTE—*Company—Signature by Managing Director—Personal Liability.*

A promissory note was signed by the managing director of a company in the following form:—"Six months after demand I promise to pay to Mrs. M. Chapman the sum of 300*l.* for value received together with six per cent. interest per annum. J. H. Smethurst's Laundry and Dye Works, Limited. J. H. Smethurst, Managing Director." In an action upon the note against the managing director:—

Held, that the note was the note of the company, and that the defendant was not personally liable.

Decision of Channell J., [1909] 1 K. B. 73, reversed. CHAPMAN *v.* SMETHURST - **C. A. 927**

PROOF—Onus of—Workmen's compensation—Notice of accident — Failure to give notice - - - - - - - **957**
See EMPLOYER AND WORKMAN. 7.

PROPERTY AND INCOME TAX - - **694**
See REVENUE. 3.

PUBLIC HEALTH — Building — Conversion of building into dwelling-house — "New building"—Breach of by-law - **263**
See LOCAL GOVERNMENT. 1.

—— Local government — Special expenses — Precept to overseers—Change of overseers pending appeal - - - **768**
See LOCAL GOVERNMENT. 3.

PURCHASER—Vendor and.
See under VENDOR AND PURCHASER.

QUARTER SESSIONS — Incorrigible rogue — Sentence by quarter sessions—Appeal —Vagrancy - - - - - **439**
See CRIMINAL LAW. 6.

—— Overseer — Solicitor — Exemption—Appeal to quarter sessions — Costs — Writ of privilege - - - - - - **449**
See POOR LAW. 1.

—— Poor rate — Non-payment of — Matter appealable to quarter sessions—Jurisdiction of justices to go behind rate
See RATES. 1. **860**

RAILWAY—*Carriage of Goods—Reduction of "Rate authorized" where Company does not provide Trucks—Meaning of "Rate authorized"—Great Western Railway Company (Rates and Charges) Order Confirmation Act*, 1891 (54 & 55 *Vict. c. cxxxii.*), *Sched.*, *s.* 2 (*b*).

By the schedule to the Great Western Railway Company (Rates and Charges) Order Confirmation Act, 1891, s. 2 (*b*), it is provided that in certain cases, where the company do not provide the trucks in which merchandise is carried on the railway, the "rate authorized for conveyance" shall be reduced by a sum which shall, in the event of difference between the company and "the person liable to pay the charge," be determined by an arbitrator:—

Held, that the "rate authorized for conveyance" in the above-mentioned enactment means

RAILWAY—*continued.*

the actual rate in force for the time being as published in the company's book of rates, and not the maximum rate which the company are by the schedule authorized to charge. SPILLERS & BAKERS, LIMITED *v.* GREAT WESTERN RAILWAY COMPANY - - - - **C. A. 604**

2. —— *Level Crossing — Road raised on Inclined Planes—Repair of Roadway.*

A railway company, being authorized to carry their railway across a high road on the level, constructed the railway at a slightly higher level than the road, and, in order to bring the road up to the level of the railway, raised it by means of inclined planes on either side of the railway under powers conferred by their special Act. The Act was silent as to any obligation of the company to repair the roadway upon the inclined planes:—

Held, that there was imposed upon the company by the common law, as a condition of the statutory authority to interfere with the high road, an obligation to keep in repair the roadway upon the whole of the inclined planes, including those portions which lay outside the fences of the railway.

West Lancashire Rural Council v. *Lancashire and Yorkshire Railway*, [1903] 2 K. B. 394, distinguished. HERTFORDSHIRE COUNTY COUNCIL *v.* GREAT EASTERN RAILWAY COMPANY **Jelf J. 368**

3. —— *Railway and Canal Commission—Practice—Undue Preference—Through Rate—Joinder of Defendants.*

Traders who complain of a through rate as being an undue preference must join as defendants all the companies concerned in making the through rate. CHANCE & HUNT, LIMITED *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY - - **Court of Railway & Canal Commission 550**

4. —— *Traffic Management—Undue Preference—Special Agreement—Adequate Consideration — Rebate — Traffic served by competing Railways—Claim for Damages—Payment of Rate under protest—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *s.* 2—*Railway and Canal Traffic Act*, 1888 (51 & 52 *Vict. c.* 25), *s.* 12.

In order to establish a case of undue preference against a railway company the applicants must satisfy the Court that there is something undue, unreasonable, or unfair in the railway company's treatment of the parties under investigation relatively to one another. A mere inequality in charge raises a presumption that this is so; but that presumption may be rebutted. When the inequality is the result of a fair and honest bargain, the consideration for which has been duly executed and enjoyed by the railway company, it is not an undue preference. Such bargains, however, must be looked upon with suspicion, and, in case of such an agreement of modern date, with great suspicion.

The applicants complained that certain traders, the S. Company, whose works were situate at S. on the defendants' main line, and who were rivals in trade of the applicants, were

RAILWAY—*continued.*

unduly preferred by the defendants in the following respects :—(1.) That the defendants did all the terminal services and provided all the terminal accommodation at the S. Company's works free of charge; (2.) that they hauled all the inward traffic from their main line to the S. Company's works and did the internal shunting at a low fixed charge of 1¼*d.* per ton, and carried the outward traffic from the works to the main line at a fixed charge of 1*d.* per ton, which charges were lower than those laid upon the applicants in respect of their traffic; (3.) that for coal and coke brought to the S. Company's works from certain named collieries a lower mileage rate per ton was charged than in case of coal brought to the applicants' works.

As a justification the defendants pleaded that, being empowered by statute to acquire by compulsion or agreement certain private railways and sidings of the S. Company, they had agreed to purchase the same for a fixed sum of money; that as part of the consideration of the agreement the S. Company agreed to pay at the rate of 1¼*d.* per ton for the carriage of all minerals and other goods traffic from the purchased railways to the S. Company's sidings, and to pay 1*d.* per ton and no more for the working of coal traffic from a certain colliery to the defendants' main line at S.; that all castings and manufactured goods and all materials sent from the S. Company's works were to be carried by the defendants to their main line at S. at the same rate; and that all goods and materials carried by the defendants for the S. Company were to be delivered into the S. Company's works without any terminal charge for the delivery thereof :—

Held that, as the agreement was bona fide, the consideration above stated, being good and adequate, justified the charges made, and that there was no undue preference.

The applicants also complained of certain rebates allowed by the defendants to rival traders whose works were situate at various stations on the defendants' railway. In these cases the traders performed services in hauling their traffic over their intervening sidings to and from the defendants' railway. They were served by other railway companies in competition with the defendants and having in each case better access to the works of the traders than the defendants had. In order to secure a share of the traffic the defendants were compelled to make the rebates complained of, which were not in excess of a reasonable remuneration for the services performed by the traders :—

Held, following *Phipps* v. *London and North Western Ry. Co.*, [1892] 2 Q. B. 229, that in view of the competition of the other railway companies these rebates were justified.

At other places on the defendants' railway rebates had been allowed to traders in competition with the applicants in respect of services performed by them at their private sidings. The defendants alleged, but failed to prove, that the rates charged to these traders were station to station and not merely station to siding rates. For over two years the applicants had with full knowledge of the facts paid the rate charged to them without claiming any rebate, but stating at

RAILWAY—*continued.*

the time of payment in every case that payment was made without prejudice to their right to a similar rebate. In an action to recover as damages the amount which they might have claimed as rebate :—

Held, that s. 12 of the Railway and Canal Traffic Act, 1888, which provides that such damages shall not be awarded unless complaint has been made within one year from the discovery by the party aggrieved of the matter complained of, precluded the applicants from recovering. HOLWELL IRON COMPANY, LIMITED *v.* MIDLAND RAILWAY COMPANY
Court of Railway and Canal Commission 486

—— Poor rate—Reduction of value of railway through competition of tramways and tube railways - - - - **274**
See RATES. 3.

RATES—*Justices—Poor Rate—Non-payment of—Application for Distress Warrant—Sufficient Cause for Non-payment—Matter appealable to Quarter Sessions—Jurisdiction of Justices to go behind Rate.*

A rate was made by a local authority under a local Act which provided that occupiers of land used only "as a railway constructed under the powers of any Act of Parliament for public conveyance" should be assessed in respect of one fourth part only of the value. The Act gave to any party aggrieved by a rate a right to appeal to quarter sessions. It also provided that if any person failed to pay the rate due from him he might be summoned before a justice, and if "no sufficient cause for the non-payment" of the rate should be shewn a distress warrant should be issued. The respondents were assessed to the above-mentioned rate on the aggregate rateable value of a tramroad and certain other property. A demand note for the amount of the rate was served on the respondents, in which they were charged on the full rateable value of the whole hereditaments, but they did not appeal to quarter sessions. A summons having been issued against them for non-payment of the rate, it was admitted by the local authority that, on the assumption that a decision of the Court of Appeal then under appeal to the House of Lords was correct, so much of the respondents' rateable hereditaments as consisted of a tramroad was a railway of the kind mentioned in the local Act, and that the respondents should have been charged on one fourth part only of its value. The parties also agreed the sum to which the demand should on the above assumption have been reduced. Under these circumstances the justices refused to issue their distress warrant for the full amount of the demand note :—

Held by Lord Alverstone C.J. and Walton J. (Bigham J. dissenting), that the respondents had shewn sufficient cause for the non-payment of the larger amount, and that the justices were justified in their refusal.

By Bigham J., that the objection to the assessment was matter of appeal to the quarter sessions, and could not be taken before the justices on an application for a distress warrant. DIXON *v.* BLACKPOOL AND FLEETWOOD TRAMROAD COMPANY - - - - **Div. Ct. 860**

RATES—*continued.*

2. —— *Occupation—Empty Building—Intention to use when Occasion requires.*

A firm of manufacturers purchased a building with the object of having premises to which they might transfer their business in the event of their existing factory being burnt or other emergency arising. They put into the building and affixed to the walls some shafting and wooden benches suitable for their business, but no engine or motive power, and it was incapable of being used for that business until further fitted up for the purpose. There were no chattels in it, and except as above mentioned it was wholly empty :—

Held, that the act of the owners in keeping the premises in readiness for use in their business at any moment that they might be required amounted to occupation of the premises by them, so as to render them liable to be rated in respect of them. BORWICK *v.* SOUTHWARK CORPORATION - - - - **Div. Ct. 78**

3. —— *Railway Company — Poor Rate — Metropolis—Quinquennial Valuation — Provisional List—Reduction of Value of Railway through Competition of Tramways and Tube Railways—"Any Cause"—Mandamus to Assessment Committee to appoint Valuer—Valuation (Metropolis) Act*, 1869 (32 *&* 33 *Vict. c.* 67), *s.* 47.

Where competition by tramways, tube railways, and lines of motor omnibuses, all of which were in existence at the time when the last quinquennial valuation list for a metropolitan parish was made, has, in subsequent years of the quinquennial period, caused a large and continuous decrease of the receipts of a railway company in respect of local passenger traffic over a portion of their line situated in the parish, whereby the rateable value of that portion of their line has been reduced, s. 47 of the Valuation (Metropolis) Act, 1869, is applicable, and if, upon a requisition by the company, the overseers make default in sending a provisional list to the assessment committee in pursuance of sub-s. 1 of the before-mentioned section, it becomes the duty of the assessment committee under sub-s. 2 of the section to appoint a valuer to make such a list. THE KING *v.* SOUTHWARK ASSESSMENT COMMITTEE **C. A. 274**

4. —— *Rateability of Owner—Parliamentary Borough—Tenement wholly let out in Apartments or Lodgings—Representation of the People Act*, 1867 (30 *&* 31 *Vict. c.* 102), *s.* 7—*Poor Rate Assessment and Collection Act*, 1869 (32 *&* 33 *Vict. c.* 41), *ss.* 3, 4.

The appellants were the owners of tenements situate in a borough which in the year 1867 was, and ever since had been, a parliamentary borough. The tenements were wholly let out in apartments or lodgings not separately rated within the meaning of s. 7 of the Representation of the People Act, 1867. Purporting to act under that section, the rating authority rated the appellants as owners, instead of the occupiers of the tenements, without allowing them any commission, abatement, or reduction :—

Held, that the appellants were properly rated as owners (instead of the occupiers) under s. 7 of the Representation of the People Act, 1867, and were therefore not entitled to any commission, abatement, or reduction from the amount of the rate.

Davis v. *Wallis*, [1908] 2 K. B. 134, overruled.

That portion of s. 7 of the Representation of the People Act, 1867, which provides for the rating of owners of houses wholly let out in apartments or lodgings not separately rated has not been repealed by implication by the Poor Rate Assessment and Collection Act, 1862, or otherwise. WHITE AND HALES *v.* ISLINGTON CORPORATION - - - - - **C. A. 133**

5. —— *Valuation List—Supplemental Lists—Notice of Objection—Application to respite Appeal — Waiver of Condition Precedent to Appeal — Poor Rate — Union Assessment Committee Amendment Act*, 1864 (27 *&* 28 *Vict. c.* 39), *s.* 1.

Sect. 1 of the Union Assessment Committee Amendment Act, 1864, enacts that no person shall be empowered to appeal to any sessions against a poor rate made in conformity with the valuation list unless he shall have given to the assessment committee notice of objection against the list and shall have failed to obtain such relief as he deems just.

If a person has given notice of objection against the valuation list and has failed to obtain relief, the fact that a supplemental valuation list, not containing his hereditament, has been approved by the assessment committee after the notice of objection was given does not render it necessary for him to give a fresh notice of objection before appealing to quarter sessions ; and, if he does not appeal against the rate in force at the time the notice of objection was given, he is entitled to appeal, without further notice of objection, against a subsequent rate made in conformity with the same valuation list, provided that the appeal is to the next practicable quarter sessions after the decision of the assessment committee.

Reg. v. *Great Western Ry. Co.*, (1869) L. R. 4 Q. B. 323, and *Reg.* v. *Justices of Denbighshire*, (1885) 15 Q. B. D. 451, discussed.

Per Farwell and Kennedy L.JJ. : A respondent to a rating appeal, who applies for and obtains a respite of the appeal, does not by so doing waive an objection to the validity of the notice of objection. RHONDDA VALLEY BREWERIES COMPANY *v.* PONTYPRIDD UNION ASSESSMENT COMMITTEE - - **C. A. 652**

6. —— *Valuation List — Assessment Committee—Objection of Ratepayer that Assessment too high—Power of Committee to raise Objector's Assessment—Union Assessment Committee Act*, 1864 (27 *&* 28 *Vict. c.* 39), *s.* 1.

A rate was made based upon the valuation list then in force, and a demand note for the rate was served upon a ratepayer. He gave note of objection to the assessment committee, under s. 1 of the Union Assessment Committee Act, 1864, that the assessment in the valuation list of the premises in respect of which he was

RATES—*continued.*
rated was too high. The assessment committee heard the objection and, instead of merely refusing him relief, raised the assessment and amended the valuation list accordingly. They gave notice of the amendment to the overseers, who accordingly altered the current rate and served upon the ratepayer a fresh demand note for a larger sum based upon the increased assessment. The ratepayer paid the amount of the original demand note, but refused to pay more. On a complaint for non-payment of the balance the magistrate refused to issue his distress warrant:—

Held, that the assessment committee had no power to raise the ratepayer's assessment, that the amended rate was consequently a nullity, and that the magistrate was right in dismissing the complaint. HUDSON *v.* RHODES - **Div. Ct. 85**

—— Franchise—Rating—Successive occupation —Representation of the People Acts, 1832 and 1867 - - - - **227**
See PARLIAMENT. 3.

—— Railway.
See under RAILWAY.

RECEIVER — *Equitable Execution — Weekly Payment by Husband to Wife under Order of Court of Summary Jurisdiction — Practice — Summary Jurisdiction (Married Women) Act*, 1895 (58 *&* 59 *Vict. c.* 39), *ss.* 4, 5.

The Court has no jurisdiction, on the application of a judgment creditor of a married woman who has obtained a separation order from her husband under the Summary Jurisdiction (Married Women) Act, 1895, to appoint a receiver by way of equitable execution of a weekly sum ordered by the Court of summary jurisdiction to be paid by the husband to his wife for her maintenance.

Watkins v. *Watkins*, [1896] P. 222, considered and applied. PAQUINE *v.* SNARY **C.A. 688**

—— Bankruptcy—Mutual dealings—Set-off—Company—Receiver of debtor's interest in debenture stock - - - **430**
See BANKRUPTCY. 3.

RECEIVING ORDER — Married woman — Separate trading—Separate property—Jurisdiction - - - - **201**
See BANKRUPTCY. 2.

RECOGNIZANCE—Probation of offenders—Condition as to abstention from intoxicating liquor - - - - - - **892**
See CRIMINAL LAW. 9.

REGISTRATION—Parliamentary and Municipal Registration Acts.
See under PARLIAMENT.

REMOVAL—Pauper.
See under POOR LAW.

REMUNERATION—Local inquiry—"Expenses"—Liability of district council - **554**
See LOCAL GOVERNMENT. 2.

RENEWAL—Lease by mortgagor in possession —Lease including land other than mortgaged land—Option to determine—Option to renew - - - - **837**
See MORTGAGE.

RENT—Hiring agreement with option to purchase—Right of owner to sue for arrears of rent after retaking possession - **98**
See BAILMENT.

REPAIR — Highway — Extraordinary traffic — Limitation of time for bringing action
See HIGHWAY. 2. **471**

—— Railway company—Level crossing—Road raised on inclined planes—Repair of roadway - - - - - **368**
See RAILWAY. 2.

—— Tramway—Right of tramway company to maintain road in good repair—Removal of snow - - - - - **68**
See TRAMWAY.

REPRESENTATION OF THE PEOPLE ACTS, 1832 and 1867.
See under PARLIAMENT.

RESERVOIR — "Building" — Reservoir authorized by special Act—Supervision of district surveyor - - - - **744**
See LONDON. 2.

—— Land compulsorily taken—Special adaptability for reservoir—Compensation **16**
See WATERWORKS.

RESTRAINT OF TRADE—Trade union—Action by member against society—Illegality —Strike pay - - - - **901**
See TRADE UNION. 2.

RETROSPECTIVE—Trade Disputes Act, 1906—Statute, whether retrospective - **310**
See TRADE UNION. 1.

REVENUE — *Income Tax — Deductions — Profits of Brewery — Tied Licensed Houses—Compensation Charge — Licensing Act*, 1904 (4 *Edw.* 7, *c.* 23), *s.* 3—*Income Tax Act*, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 100, *cases* 1 *and* 2, *r.* 1; *Sched. D.*

A company, which carried on the trade of brewers, were, solely for the purposes and as part of their business and as a necessary incident of the profitable working thereof, the owners of licensed houses which they let to tenants, who covenanted to buy all their beers from the company, and in consideration thereof the tenants paid to the company a less rent than the annual value of the houses would warrant. By means of these houses, which were substantially part of the plant or outfit necessary to carry on the business profitably, the company were enabled to earn increased profits, upon which they paid income tax. The company were compelled, under s. 3 of the Licensing Act, 1904, to allow to the tenants of the licensed houses certain deductions from rent in respect of the company's share of the annual compensation charge imposed on the licensed houses, and the company claimed

that, in arriving at the amount of the profits of their trade as brewers assessable to income tax, a deduction ought to be allowed in respect of the sum which they were compelled to pay for the compensation charge, as being an expense incurred in carrying on that trade :—

Held that, as the company's share of the compensation charge was payable by them as owners of the licensed houses towards forming a fund to compensate those who were interested therein for the loss of the trade carried on there, and as that trade was the tenants' trade, though the company were interested in it, the company's share of the compensation charge was not a disbursement or expense wholly and exclusively laid out or expended for the purposes of the company's trade as brewers within the meaning of s. 100, cases 1 and 2, r. 1, of the Income Tax Act, 1842, Sched. D, and that therefore the company were not entitled to any deduction in respect thereof. SMITH *v.* LION BREWERY COMPANY - - - - **Channell J. 711**

2. —— *Income Tax—Inhabited House Duty—Annual Value of Premises—Premises Let on Lease—Covenant by Lessor to pay Fire Insurance Premium—Deduction—Annual Value adopted for preceding Year—Conclusiveness—Finance Act*, 1905 (5 *Edw. 7, c.* 4), *s.* 6, *sub-s.* 3—*House Tax Act*, 1808 (48 *Geo.* 3, *c.* 55), *Sched. B—House Tax Act*, 1851 (14 *&* 15 *Vict. c.* 36), *ss.* 1, 2 ; *Schedule—Income Tax Act*, 1842 (5 *&* 6 *Vict. c.* 35), *s.* 60, *Rule No. I.—Income Tax Act*, 1853 (16 *&* 17 *Vict. c.* 34), *s.* 2, *Sched. A.*

By s. 6, sub-s. 3, of the Finance Act, 1905 (which is a common form provision in the Finance Act of most years), "the annual value of any property which has been adopted for the purpose either of income tax under Scheds. A and B in the Income Tax Act, 1853, or of inhabited house duty, during the year ending on April 5, 1905, shall be taken as the annual value of such property for the same purpose during the next subsequent year," but this provision is not to apply to the metropolis :—

Held, that the annual value adopted for the preceding year was by the above provision made conclusive of the annual value of the property during the next subsequent year for income tax and inhabited house duty.

Semble, where the lessor of premises covenants to pay the fire insurance premium thereon, a deduction in respect of the premium so paid cannot be made from the rent payable to him by the lessee for the purpose of arriving at the annual value of the premises for assessment to income tax under Sched. A and inhabited house duty. TURNER *v.* CARLTON - **Channell J. 932**

3. —— *Property and Income Tax—Return of Profits under Sched. D.—"Deliver Statement as aforesaid"—Failure to deliver a true and correct Statement—Illusory Statement—Income Tax Act*, 1842 (5 *&* 6 *Vict. c.* 35), *ss.* 52, 55.

Sect. 55 of the Income Tax Act, 1842, which imposes a penalty in case a person chargeable refuses or neglects "to deliver any . . . . statement as aforesaid" of his average profits under Sched. D, applies only to non-delivery as distinct from delivery of an imperfect or inaccurate statement.

Lord Advocate v. *Sawers*, (1897) 35 Sc. L. R. 190 ; 3 Tax Cases, 617, not followed on this point.

The delivery of a merely illusory statement will not be a compliance with the requirements of this section.

The defendant had made some yearly returns of his average net profits which were admittedly inaccurate ; when the mistake was discovered by the revenue authority he offered to pay the difference on the last year's return, but not for inaccuracies in previous years which were statute-barred. This offer was declined, and an information was laid by the Attorney-General claiming the 50*l.* penalty :—

Held, reversing the decision of Lord Alverstone C.J., that as the defendant had delivered a statement, though inaccurate, he was not liable to the penalty, and the action must be dismissed. ATTORNEY-GENERAL v. TILL - - **C. A. 694**

4. —— *Stamp—Agreement for Sale of Goods—Price to be paid by Instalments at stated Periods—Liability to ad valorem Stamp Duty—Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *Sched. I.*

By an agreement in writing between the appellants and one of their customers the appellants agreed to supply to the customer for a period of seven years electric current for motive power, heating, and lighting purposes on the customer's premises at the rate of a penny per unit with a fixed minimum charge payable quarterly. The revenue authorities were willing for the purposes of the case to treat the document as an agreement for the sale of goods :—

Held, that the document came within the words "Bond, covenant or instrument . . . . being the only or principal or primary security for . . . . sums of money at stated periods . . . . for a definite and certain period" in Sched. I. to the Stamp Act, 1891, and that stamp duty was payable in respect of it at the rate of 2*s.* 6*d.* per cent. on the aggregate amount of the minimum quarterly payments for seven years. COUNTY OF DURHAM ELECTRICAL POWER DISTRIBUTION COMPANY *v.* INLAND REVENUE COMMISSIONERS - - - - **Channell J. 737**

5. —— *Stamp—Capital of Company—"Increase of Registered Capital"—Resolution of Company authorizing Directors to increase Capital—Subsequent Issue of Shares by Directors—Stamp Act*, 1891 (54 *&* 55 *Vict. c.* 39), *s.* 112.

By s. 112 of the Stamp Act, 1891, "a statement of the amount which is to form the nominal share capital of any company to be registered with limited liability shall be delivered to the Registrar of Joint Stock Companies . . . . and a statement of the amount of any increase of registered capital of any company now registered or to be registered with limited liability shall be delivered to the said registrar, and every such statement shall be charged with an ad valorem stamp duty of 2*s.* (now 5*s.*) for every 100*l.* . . . . of the amount of such capital or increase of capital, as the case may be."

The articles of association of a company gave

REVENUE—*continued.*
the directors power, with the sanction of a general meeting, to increase the capital of the company by the creation and issue of new shares. A resolution was passed at a general meeting of the company that "the directors be, and they are hereby, authorized to increase the capital of the company by an amount not exceeding the nominal sum of 5,000,000*l.*, by the creation and issue from time to time of new ordinary shares of 5*l.* each." The directors thereupon passed a resolution that "the capital of the company be increased by 200,000*l.* by the creation and issue of 40,000 new ordinary shares of 5*l.* each"; and on a subsequent occasion they passed another resolution in similar language increasing the capital by 2,800,000*l.* The Crown claimed stamp duty under s. 112 of the Stamp Act, 1891, in respect of an increase of capital of 5,000,000*l.* The defendants contended that they were only bound to pay stamp duty in respect of an increase of capital of 3,000,000*l.*, the amount of capital actually created and issued by the directors of the company:—

Held, that "registered capital" in s. 112 of the Stamp Act, 1891, meant authorized capital, i.e., the maximum amount of capital which the company had power to issue; and that, by the resolution of the company, there had been an increase of that capital by 5,000,000*l.*, upon which sum ad valorem stamp duty was payable. ATTORNEY-GENERAL *v.* ANGLO-ARGENTINE TRAMWAYS COMPANY - - **Channell J. 677**

6. —— *Succession Duty—Annuity payable to Trustee for Settlement—New Trustee appointed on Death of former Trustee — "Substitutive Limitation"—Succession Duty Act*, 1853 (16 *&* 17 *Vict. c.* 51), *s.* 2—*Estate Duty—Property passing on Death — Exception — Interest as "holder of an office"—Trustee—Finance Act*, 1894 (57 *&* 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*b*).

By an indenture property was settled upon three named trustees upon trust that they and the survivors and survivor, and the executors and administrators of such survivor, or other the trustees or trustee for the time being of the settlement (thereinafter called "the trustees or trustee"), should, so far as material, pay "an annual sum of 200*l.* each to the trustees or trustee while acting in the trusts by way of remuneration for their services, and in addition to any payments for professional services," and subject thereto upon trust to pay the income of the property according to the direction of the settlor during her life, with remainders over. The settlor during her life had power to appoint a new trustee or new trustees for the purposes of the trust. One of the original trustees died, having received the annual sum of 200*l.* up to the date of his death, and the settlor appointed a new trustee in his place. The Crown claimed succession duty upon the annual sum of 200*l.* to which the new trustee became entitled upon his appointment, and also estate duty and settlement estate duty upon the principal value of the capital fund yielding the annual sum of 200*l.*:—

Held—(1.) that the new trustee did not become entitled to the annual sum of 200*l.* by reason of the settlement upon the death of the

REVENUE—*continued.*
former trustee within the meaning of s. 2 of the Succession Duty Act, 1853, but by reason of the settlement coupled with the vacancy and his appointment as trustee, and that succession duty was not payable; and (2.) that the interest which the deceased trustee had in the property was an interest only as holder of an office, namely, the office of trustee, within the exception in s. 2, sub-s. 1 (*b*), of the Finance Act, 1894, and that estate duty and settlement estate duty were not payable. ATTORNEY-GENERAL *v.* EYRES - - - - - **Channell J. 723**

REVISING BARRISTER.
See under PARLIAMENT.

ROAD.
See under HIGHWAY.

ROGUE — Incorrigible rogue — Sentence by quarter sessions—Appeal—Vagrancy
See CRIMINAL LAW. 6. **439**

RULES OF SUPREME COURT, Order L., r. 3—*Interlocutory Orders as to Mandamus, Injunctions, or Interim Preservation of Property, &c.* - - - - - **943**
See SHIPPING. 2.

—— **Order LVIII., r. 1**—*Appeals to the Court of Appeal* - - - - - - **103**
See BANKRUPTCY. 4.

SALE—Food and drugs—Adulteration.
See under ADULTERATION.

SALE OF GOODS — Agreement for — Stamp—Price to be paid by instalments at stated periods - - - - - - **737**
See REVENUE. 4.

—— Interest in land—Slag to be severed and removed by purchaser — Breach of contract — Defect of title — Damages
See VENDOR AND PURCHASER. **357**

SCHOOLS — *Non-provided School — Supply of Water — Maintenance of School — Liability of Local Education Authority — Education Act*, 1902 (2 *Edw.* 7, *c.* 42), *s.* 7.

A water company, before the Education Act, 1902, came into operation, supplied water by meter to the managers of a voluntary public elementary school for the purposes (not being domestic purposes) of the school buildings. Since the Act of 1902 the water company continued to supply the water to the school buildings as before. No contract, other than that to be implied from the fact of supply, the purposes for which the water was supplied, and the course of dealing between the parties, was entered into between the water company and the local education authority. The water company continued, as they had done before the Act, to send the demand note for payment for the water supplied to the managers of the school, and the latter included the charges in the quarterly accounts of their expenditure sent by them to the local education authority, who paid the amount direct to the water company. The water company then gave a receipt for the

SCHOOLS—*continued.*
amount to the local education authority. The water so supplied was necessary for the maintenance of the school. In an action in the county court by the water company against the local education authority to recover for water supplied during the year ending Midsummer, 1908, the local education authority contended that they had no power to make a contract for the supply of water to the school, and that only the managers of the school had power to make such a contract. The county court judge having given judgment for the water company :—

Held, that the local education authority had power to enter into a contract for the supply of water necessary for the maintenance of the school, and that there was evidence upon which the county court judge might properly find that they had made a contract with the water company. TROWBRIDGE WATER COMPANY *v.* WILTS COUNTY COUNCIL - - **Div. Ct. 824**

—— Child employed in agriculture—Exemption from school attendance - - **613**
See EDUCATION.

SECURITY FOR COSTS.
See under COSTS.

SEPARATION—Fraud by wife—Tort committed during coverture—Subsequent decree of judicial separation—Husband's liability
See HUSBAND AND WIFE. **880**

SEPARATION DEED—Action by trustees for wife under — Security for costs — "Nominal plaintiff" - - - **50**
See PRACTICE. 2.

SERVANT—Master and.
See under EMPLOYER AND WORKMAN.

SET-OFF — Mutual dealings—Company — Receiver of debtor's interest in debenture stock - - - - - - - **430**
See BANKRUPTCY. 3.

SETTING ASIDE—Subpœna not issued for purpose of obtaining relevant evidence—Jurisdiction - - - - - - **258**
See CRIMINAL LAW. 5.

SHERIFF—"*Execution for a Sum exceeding 20l.*"—*Contingent Expenses—Bankruptcy Act*, 1890 (53 *&* 54 *Vict. c.* 71), *s.* 11, *sub-s.* 2.

Although a sheriff, or high bailiff of a county court, when levying under a warrant of execution is entitled to seize sufficient goods to cover the contingent expenses of possession money, appraisement, and sale, yet in ascertaining whether the execution is "for a sum exceeding 20*l.*" within the meaning of s. 11 of the Bankruptcy Act, 1890, and whether consequently he is obliged to retain the proceeds of execution as therein directed, the judgment debt and poundage only can be taken into consideration, and not the expenses of possession money, appraisement, and sale, unless those expenses have been actually incurred. WILLEY *v.* HUCKS - **Div. Ct. 760**

SHIPPING — *Charterparty—Lien—Demurrage, payable day by day—Charges—Dead Freight.*

A charterparty provided that demurrage should be paid, at a specified rate, "day by day as falling due," and that the owner should have a lien upon the cargo for "all freight, demurrage and all other charges whatsoever" :—

Held, that the fact that demurrage was payable day by day as falling due did not deprive the shipowner of his lien for demurrage.

Gardner v. *Trechmann*, (1884) 15 Q. B. D. 154, and *Pederson* v. *Lotinga*, (1857) 28 L. T. (O.S.) 267, distinguished.

Held, also, that the word "charges" did not include dead freight. REDERIACTIESELSKABET "SUPERIOR" *v.* DEWAR & WEBB - **Bray J. 948**

SHIPPING—*continued.*

2. —— *Practice—Ship—Constructive Total Loss—Subject-matter of Action—Order to bring within Jurisdiction—Preservation—Inspection—Rules of Supreme Court, Order* L., *r.* 3.

In an action by shipowners claiming under a policy of marine insurance in respect of an alleged constructive total loss of their ship, the defendants applied at chambers for an order that the ship, which was lying unrepaired in Singapore harbour, be brought to England before the trial of the action, at the defendants' risk and expense, on the ground that it was necessary for the preservation and inspection of the ship :—

Held, that the Court had power, under Order L., r. 3, to make the order, and that in the circumstances it was right that the order should be made. STEAMSHIP NEW ORLEANS COMPANY *v.* LONDON AND PROVINCIAL MARINE AND GENERAL INSURANCE COMPANY **C. A. 943**

—— Workmen's compensation—Ladder - **417**
See EMPLOYER AND WORKMAN. 9.

—— Workmen's compensation—Lighter - **389**
See EMPLOYER AND WORKMAN. 8.

SIGNATURE — Promissory note — Company—Signature by managing director—Personal liability - - - - **927**
See PROMISSORY NOTE.

SLAG—Sale of goods—Interest in land—Slag to be severed and removed by purchaser—Breach of contract—Defect in title—Damages - - - - - **357**
See VENDOR AND PURCHASER.

SLANDER — Action for — Discovery — Interrogatories—Defence of fair comment
See PRACTICE. 1. **239**

SMALL BANKRUPTCY—Costs—Taxation - **92**
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SNOW—Tramway—Removal of snow - - **68**
See TRAMWAY.

SOLICITOR—Overseer—Exemption — Poor law —Appeal to quarter sessions—Costs—Writ of privilege - - - - **449**
See POOR LAW. 1.

STAMP—Capital of company — "Increase of registered capital" - - - **677**
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STAMP—*continued.*
—— Sale of goods, Agreement for—Price to be paid by instalments at stated periods—Liability to ad valorem stamp duty
See REVENUE. 4. **737**

STATUTE—Statute Law Revision Act, 1874 (No. 2)—London Hackney Carriages Acts - - - - - - - **57**
See HACKNEY CARRIAGE.

STATUTES:—

1601.

42 Eliz. c. 2, s. 5—*Poor Law* - - - **449**
See POOR LAW. 1.

1662.

13 & 14 Car. 2, c. 12, ss. 1, 2—*Poor Relief* **463**
See POOR LAW. 3.

1774.

14 Geo. 3, c. 48, ss. 1, 3—*Life Assurance* **805**
See INSURANCE (LIFE).

1808.

48 Geo. 3, c. 55, Sched. B—*House Tax* - **932**
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1824.

5 Geo. 4, c. 83, ss. 3, 4, 5—*Vagrancy* - **439**
See CRIMINAL LAW. 6.

1832.

2 & 3 Will. 4, c. 45, ss. 27, 28, 30—*Representation of the People* - - - **227**
See PARLIAMENT. 3.

1833.

3 & 4 Will. 4, c. 42, ss. 3, 5—*Civil Procedure*
See LIMITATION OF TIME. **577**

1834.

4 & 5 Will. 4, c. 76, s. 81—*Poor Law Amendment* - - - - - - - **463**
See POOR LAW. 3.

1842.

5 & 6 Vict. c. 35, ss. 52, 55—*Income Tax* **694**
See REVENUE. 3.

—— —— s. 60, Rule No. I. - - - **932**
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—— —— s. 100, cases 1 and 2, r. 1; Sched. D.
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1843.

6 & 7 Vict. c. 18, ss. 38, 39—*Parliamentary Registration* - - - - - **348**
See PARLIAMENT. 2.

6 & 7 Vict. c. 86, s. 29—*London Hackney Carriages* - - - - - - **57**
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1845.

8 & 9 Vict. c. 117, s. 2—*Poor Removal* - **454**
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STATUTES—*continued.*

1848.

11 & 12 Vict. c. 31, s. 9—*Poor Law Procedure* - - - - - - **463**
See POOR LAW. 3.

1849.

12 & 13 Vict. c. 32, s. 2—*Cruelty to Animals* - - - - - - **626**
See CRIMINAL LAW. 2.

1850.

13 & 14 Vict. c. 7, ss. 4, 8—*London Hackney Carriages* - - - - **57**
See HACKNEY CARRIAGE.

1851.

14 & 15 Vict. c. 36, ss. 1, 2, Sched.—*House Tax* - - - - - - **932**
See REVENUE. 2.

1853.

16 & 17 Vict. c. 33, s. 19—*London Hackney Carriages* - - - - - **57**
See HACKNEY CARRIAGE.

16 & 17 Vict. c. 34, s. 2, Sched. A—*Income Tax* - - - - - - - **932**
See REVENUE. 2.

16 & 17 Vict. c. 51, s. 2—*Succession Duty* **723**
See REVENUE. 6.

1854.

17 & 18 Vict. c. 31, s. 2—*Railway and Canal Traffic* - - - - **486**
See RAILWAY. 4.

1857.

20 & 21 Vict. c. 85, s. 26—*Matrimonial Causes* - - - - - - **880**
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1861.

24 & 25 Vict. c. 76, s. 2—*Poor Removal (No. 2)* - - - - - - **454**
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1862.

25 & 26 Vict. c. 89, s. 47—*Companies* - **106**
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25 & 26 Vict. c. 102, s. 75 (repealed)—*Metropolis Management Amendment* - - - - - - - **116**
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1863.

26 & 27 Vict. c. 89, s. 7—*Poor Removal* - **454**
See POOR LAW. 2.

1864.

27 & 28 Vict. c. 39, s. 1—*Union Assessment Committee Amendment* - - **85, 652**
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1867.

30 & 31 Vict. c. 102, ss. 3, 26, 56, 59—*Representation of the People* - **227**
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30 & 31 Vict. c. 102, s. 7 - - - - **133**
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1868.

31 & 32 Vict. c. 122, s. 38—*Poor Law Amendment* - - - - - **227**
See PARLIAMENT. 3.

1869.

32 & 33 Vict. c. 41, ss. 3, 4—*Poor Rate Assessment and Collection* - - **133**
See RATES. 4.

32 & 33 Vict. c. 67, s. 47—*Valuation, Metropolis* - - - - - - **274**
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1870.

33 & 34 Vict. c. 78, s. 28—*Tramways* - **68**
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34 & 35 Vict. c. 31, s. 4—*Trade Union* - **901**
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1874.

37 & 38 Vict. c. 96, s. 1, Schedule—*Statute Law Revision (No. 2)* - - - - - **57**
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1875.

38 & 39 Vict. c. 55, ss. 157, 159—*Public Health* - - - - - - **263**
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—— —— ss. 229, 230 - - - - - **768**
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38 & 39 Vict. c. 63, s. 18; Form in Schedule —*Sale of Food and Drugs* - - **1**
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1876.

39 & 40 Vict. c. 22, s. 16—*Trade Union Act* (1871) *Amendment* - - - **901**
See TRADE UNION. 2.

1878.

41 & 42 Vict. c. 26, s. 23—*Parliamentary and Municipal Registration* - - **348**
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—— —— s. 28, sub-s. 10 - - - **215**
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41 & 42 Vict. c. 33, s. 3—*Dentists* - - **38**
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41 & 42 Vict. c. 77, s. 23—*Highways and Locomotives (Amendment)* - - **471**
See HIGHWAY. 2.

1879.

42 & 43 Vict. c. 19, s. 3—*Habitual Drunkards* **632**
See DRUNKENNESS.

42 & 43 Vict. c. 49, s. 17—*Summary Jurisdiction* - - - - - - - **849**
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STATUTES—*continued.*

1880.

43 & 44 Vict. c. 35, s. 8—*Wild Birds Protection* - - - - - - **629**
See WILD BIRDS.

1881.

44 & 45 Vict. c. 41, s. 18—*Conveyancing and Law of Property* - - - - **837**
See MORTGAGE.

44 & 45 Vict. c. 51, s. 2—*Wild Birds Protection* - - - - - - - **629**
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1882.

45 & 46 Vict. c. 75, s. 1, sub-s. 2—*Married Women's Property* - - - **880**
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—— —— s. 1, sub-s. 5 - - - - **201**
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46 & 47 Vict. c. 51, s. 6, sub-s. 3 (*a*); s. 38, sub-s. 5—*Corrupt and Illegal Practices Prevention* - - - - - - **342**
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46 & 47 Vict. c. 52, s. 7, sub-s. 3; s. 38—*Bankruptcy* - - - - - **430**
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47 & 48 Vict. c. 70, s. 2; s. 3, sub-s. 2; s. 23—*Municipal Elections, Corrupt Practices* - - - - - - - **342**
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51 & 52 Vict. c. 21, s. 4—*Law of Distress Amendment* - - - - - - **14**
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51 & 52 Vict. c. 25, s. 12—*Railway and Canal Traffic* - - - - - - - **486**
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51 & 52 Vict. c. 43, s. 111—*County Courts* **644**
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—— —— s. 147 - - - - - - **14**
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1890.

53 & 54 Vict. c. 71, s. 8, sub-s. 6—*Bankruptcy* **559**
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—— —— s. 11, sub-s. 2 - - - - **760**
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1891.

54 & 55 Vict. c. 39, s. 112—*Stamps* - **677**
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54 & 55 Vict. c. 39, Sched. I. - - - **737**
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54 & 55 Vict. c. ccxxii., Sched., s. 2 (*b*)—*Great Western Railway Company (Rates and Charges) Order Confirmation* - **604**
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1893.

56 & 57 Vict. c. 71, ss. 51, 62—*Sale of Goods*
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56 & 57 Vict. c. 73, s. 72, sub-s. 4—*Local Government Act*, 1894 - - - **554**
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57 & 58 Vict. c. 30—*Finance* - - - **723**
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57 & 58 Vict. c. ccxiii., ss. 22, 27, 216—*London Building* - - - - - **116**
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58 & 59 Vict. c. 39, ss. 4, 5—*Summary Jurisdiction (Married Women)* - - **688**
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1896.

59 & 60 Vict. c. 36, s. 1, sub-s. 1; s. 6, sub-ss. 1, 2—*Locomotives on Highways* - **778**
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1898.

61 & 62 Vict. c. 29, s. 5, sub-ss. 1, 5; s. 17, sub-s. 2—*Locomotives* - - - **778**
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—— —— s. 12, sub-s. 1 (*b*) - - - **471**
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61 & 62 Vict. c. 36, s. 1, sub-s. (*f*) (ii.)—*Criminal Evidence* - - - **568**
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61 & 62 Vict. c. 60, s. 2, sub-s. 1—*Inebriates*
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62 & 63 Vict. c. 51, s. 1—*Sale of Food and Drugs* - - - - - - - **1**
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1 Edw. 7, c. 22, ss. 10, 135, 146—*Factory and Workshop* - - - - - - **444**
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2 Edw. 7, c. 15, ss. 2, 3—*Musical (Summary Proceedings) Copyright* - - **515**
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2 Edw. 7, c. 42, s. 7—*Education* - - **824**
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3 Edw. 7, c. 36, s. 12, sub-s. 1; s. 20, sub-ss. 1, 3 *Motor Car* - - - - - - **778**
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1904.

4 Edw. 7, c. 23, s. 3—*Licensing* - - **711**
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—— —— s. 3, Sched. II. - - - **637**
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5 Edw. 7, c. 4, s. 6, sub-s. 3—*Finance* - **932**
See REVENUE. 2.

5 Edw. 7, c. 18, s. 1, sub-ss. 3, 5, 7—*Unemployed Workmen* - - - **173**
See EMPLOYER AND WORKMAN. 11.

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6 Edw. 7, c. 43, s. 1—*Street Betting* - **774**
See STREET BETTING.

6 Edw. 7, c. 47, s. 4—*Trade Disputes* - **310**
See TRADE UNION. 1.

6 Edw. 7, c. 58—*Workmen's Compensation*
See CRIMINAL LAW. 8. **411**

—— —— s. 1 - - - - - **184, 963**
See EMPLOYER AND WORKMAN. 3, 10.

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See EMPLOYER AND WORKMAN. 9.

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See EMPLOYER AND WORKMAN. 4, 11.

—— —— s. 2 - - - - - - **957**
See EMPLOYER AND WORKMAN. 7.

—— —— s. 4, sub-s. 1; s. 13 - **165**
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—— —— Sched. I., ss. 1, 2 - - - **352**
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—— —— Sched. II., par. 9 (*d*) - - **191**
See EMPLOYER AND WORKMAN. 5.

1907.

7 Edw. 7, c. 17, s. 1, sub-s. 2; s. 2, sub-s. 2 (*b*)—*Probation of Offenders* - - **892**
See CRIMINAL LAW. 9.

7 Edw. 7, c. 21, s. 5, sub-s. 1—*Butter and Margarine* - - - - - - **1**
See ADULTERATION.

7 Edw. 7, c. 23, s. 11, sub-s. 1—*Criminal Appeal* - - - - - - **200**
See CRIMINAL LAW. 1.

—— —— s. 19; s. 20, sub-s. 2 - - **439**
See CRIMINAL LAW. 6.

STREET BETTING—*What amounts to—Street Betting Act*, 1906 (6 *Edw.* 7, *c.* 43), *s.* 1.

By s. 1 of the Street Betting Act, 1906, "Any person frequenting or loitering in streets or public places, on behalf either of himself or of any other person, for the purpose of . . . . betting" shall be guilty of an offence :—

Held, that a person who loiters in a street for the purpose of distributing handbills, stating that a third person therein named is willing to make bets upon the events and at the rates of odds therein specified, and that if the recipients of the handbills will send to such third person written offers to bet accompanied by remittances of money the offers will be accepted, is guilty of an offence under the section. DUNNING *v.* SWETMAN - - - - - - **Div. Ct. 774**

STREET IMPROVEMENT — Act of foreign Legislature—Contribution — Action in England - - - - - - **7**
See INTERNATIONAL LAW.

STRIKE—Trade Disputes Act, 1906—Strike pay —Statute, whether retrospective - **310**
See TRADE UNION. 1.

STRIKE PAY—Trade union—Restraint of trade —Action by member against society
See TRADE UNION. 2. **901**

SUBPŒNA—Setting aside—Jurisdiction — Subpœna not issued for purpose of obtaining relevant evidence - - - **258**
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SUCCESSION DUTY –Revenue — Annuity payable to trustee of settlement—New trustee appointed on death of former trustee—"Substitutive limitation" **723**
See REVENUE. 6.

SUMMARY JURISDICTION.
See under JURISDICTION.

SUMMARY PROCEEDINGS—Musical (Summary Proceedings) Copyright Act - **515**
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SURGICAL OPERATION—Workmen's compensation — Refusal to undergo surgical operation—Discretion—Right to further compensation - - - - - **184**
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See BANKRUPTCY. 6.

TAXES.
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—— Factory—Fencing of machinery—Offence — Limitation of time for laying information - - - - - **444**
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TIME—*continued.*

—— Highway—Repair—Extraordinary traffic—Limitation of time for bringing action
See HIGHWAY. 2. **471**

—— Limitation of time.
See under LIMITATION OF TIME.

TOOLS—Distress—Exemption - - - **14**
See DISTRESS.

TORT—Husband and wife — Tort committed during coverture—Subsequent decree of judicial separation — Husband's liability - - - - - - **880**
See HUSBAND AND WIFE.

TRADE — Distress — Exemption — Tools and implements of trade - - - **14**
See DISTRESS.

—— Restraint of trade—Action by member against society—Illegality - - **901**
See TRADE UNION. 2.

TRADE DISPUTES—Trade union.
See under TRADE UNION.

TRADE DISPUTES ACT, 1906—Breach of contract by workman—Strike pay—Procuring continuance of breach—Statute, whether retrospective - - - **310**
See TRADE UNION. 1.

TRADE UNION—*Procuring Breach of Contract —Trade Dispute—Strike—Breach of Contract by Workmen — Strike Pay — Procuring Continuance of Breach — Statute, whether retrospective—Trade Disputes Act*, 1906 (6 *Edw.* 7, *c.* 47), *s.* 4.

The Trade Disputes Act, 1906, s. 4, is not retrospective so as to prevent the further maintenance of an action against a trade union which was commenced before the passing of the Act.

Two workmen, members of a trade union, who had respectively entered into contracts with an employer to serve him for a term of years, broke their contracts before the passing of the Trade Disputes Act, 1906, by striking, together with others in the same employ, and continuing on strike, during the currency of the periods for which they had respectively contracted to serve. The trade union had originally sanctioned the strike in ignorance of the existence of the before-mentioned contracts, but subsequently gave the workmen strike pay, after they became aware of those contracts, in order to keep the workmen out on strike :—

Held, that the trade union, by procuring a continuing breach of contract by the workmen, had rendered themselves liable in damages to the employer.

Denaby and Cadeby Main Collieries, Ld. v. *Yorkshire Miners' Association*, [1906] A. C. 384, distinguished.

Where an agreement was made between a trade union and a federation of employers for the reference of disputes between employers and employed to arbitration, and a dispute had arisen between a particular employer, a member of the employers' federation, and his workmen :—

Held, that a bona fide belief on the part of

TRADE UNION *-continued.*
the union that the employers were intending to evade a settlement of the dispute in accordance with the agreement, or even an actual intention on the part of the employers so to do, did not constitute a cause or excuse which would justify the trade union in procuring the breach by workmen of their contracts of service with the before-mentioned employer.

Question, whether knowledge of matters known to a branch of a trade union applying to the union to sanction a strike could be imputed to the union itself, discussed. SMITHIES *v.* NATIONAL ASSOCIATION OF OPERATIVE PLASTERERS - - - - - - - **C. A. 310**

2. —— *Restraint of Trade—Action by Member against Society—Illegality—Strike Pay—Declaratory Judgment—Trade Union Act*, 1871 (34 *&* 35 *Vict. c.* 31), *s.* 4—*Trade Union Act* (1871) *Amendment Act*, 1876 (39 *&* 40 *Vict. c.* 22), *s.* 16.

The plaintiff, being a member of and in receipt of sick pay from the defendant society, was subjected to a deduction of 2*s.* 6*d.* from his sick pay for breach of the rules of the society. He thereupon brought an action in the county court for a declaration to the effect that he had not broken the rules and for the return of the 2*s.* 6*d.* as having been improperly deducted. It appeared that the defendant society was registered under the Trade Union Acts of 1871 and 1876 as a trade union, and that its rules provided for raising funds to secure to the members the benefits of a superannuation fund, a sick fund, a funeral fund, a travelling fund, and a trade fund. Rule 1 stated that the society was "a trade union." By rule 7, clause 2, section 4, "Should work be offered at the current rate of wages to any member receiving travelling relief, unless it be to fill the place of those fighting for better conditions, and he refuses to accept it, his allowance shall be at once stopped, and his card given up."

By rule 40, section 1, members paying to the trade fund were to be entitled to dispute pay, travelling relief, and assistance to sue employers under the Employers' Liability and Workmen's Compensation Acts. Section 2 was as follows: "Strike pay will only be paid in support of members endeavouring to secure an advance of wages or resisting a reduction of same, resisting an increase of the hours of labour, and, when desirable, endeavouring to secure a reduction of same." By section 4, "Should a strike take place, all members who are entitled to trade benefit under this rule shall receive pay at the rate of 1*s.* 8*d.* per day for each working day, not to exceed six weeks. If the strike continue, the executive committee shall be empowered to continue pay for a longer period, if they, upon consideration, deem it necessary. . . . ."

By section 6, "No officer or member of this society shall be authorized or permitted to take any active interest in, aid in any way, or otherwise assist any trade movement except in his private capacity. . . . ."

The judge held that the society was a trade union, that its objects were in restraint of trade and illegal at common law, and that therefore

TRADE UNION—*continued.*
he was precluded by s. 4 of the Trade Union Act, 1871, from entertaining the claim:—

Held, reversing the judgment of a Divisional Court (Channell and Sutton JJ.), which had affirmed the decision of the county court judge, that there was jurisdiction to entertain the claim, for the objects of the society were not illegal, and the rules amounted to no more than an insurance of the members against the consequences of a strike. GOZNEY *v.* BRISTOL, &C. TRADE AND PROVIDENT SOCIETY - **C. A. 901**

TRADING—Married woman—Separate trading—Receiving order—Jurisdiction - **201**
See BANKRUPTCY. 1.

TRAFFIC—Highway.
See under HIGHWAY.

—— Railway.
See under RAILWAY.

TRAMWAY—*Duty of Tramway Company to maintain Road in good repair—Removal of Snow—Tramways Act*, 1870 (33 *&* 34 *Vict. c.* 78), *s.* 28.

The removal of snow from the portion of a road lying between the rails of a tramway is not part of the "maintenance" of that portion within the meaning of s. 28 of the Tramways Act, 1870, so as to cast upon the tramway company the duty of removing it, unless the fall of snow is of such a depth as to render the road impassable. The mere fact that the removal of the snow will render the passage over the road more convenient is not enough to bring the case within the meaning of the section. ACTON DISTRICT COUNCIL *v.* LONDON UNITED TRAMWAYS - - - - - - **Div. Ct. 68**

—— Motor car passing tramcar—Duty to pass on off side—"Carriage" - - **397**
See MOTOR CAR.

TRAVELLER—Innkeeper, Customary liability of — Guest — Cost of accommodation defrayed by another person—Law of property - - - - - - **209**
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TRUSTEE—Annuity payable to trustee of settlement—Succession duty—Estate duty
See REVENUE. 6. **723**

—— Costs, Security for—Action by trustees for wife under separation deed—"Nominal plaintiff" - - - - - - **50**
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UNDUE PREFERENCE — Railway — Traffic management — Special agreement — Adequate consideration - - **486**
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UNEMPLOYED WORKMEN ACT—Provision of temporary work—Contract of service—Workmen's compensation - - **173**
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UNION—Trade union.
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UNION ASSESSMENT COMMITTEE—Valuation list—Right of committee to raise objector's assessment - - - **85**
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VAGRANCY—Incorrigible rogue -Sentence by quarter sessions—Appeal - - **439**
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VALUATION LIST—Rates.
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VALUATION (METROPOLIS) ACT, 1869—Poor rate—Railway company—Mandamus to assessment committee to appoint valuer
See RATES. 3. **274**

VENDOR AND PURCHASER—*Sale of Goods—Interest in Land—Slag to be severed and removed by Purchaser—Breach of Contract—Defect of Title—Damages—Sale of Goods Act*, 1893 (56 & 57 *Vict. c.* 71), *ss.* 51, 62.

In a counter-claim by purchasers against a vendor it appeared that the vendor was the lessee of certain land part of which was composed of slag and cinders. On adjoining lands occupied by other persons were two disused cinder-tips. The vendor had obtained from these persons licences to remove from the tips slag and cinders adhering to and forming part of their lands. He then agreed with the purchasers to sell to them all the slag on the demised premises and from the tips on the lands adjoining, or so much thereof as the purchasers should desire to remove, and for that purpose to give the purchasers access to the demised premises and the cinder-tips on the adjoining lands. After certain slag had been removed by the purchasers and sold at a profit the lessor and licensors of the vendor intervened and prevented the further removal of slag by the purchasers.

The purchasers sued for damages for the vendor's default in delivering or giving access to the slag sold :—

Held, that the agreement was not a contract for the sale of goods within the meaning of s. 62 of the Sale of Goods Act, 1893, so as to entitle the purchasers to recover as damages the difference between the contract and the market price of the slag under s. 51 of that Act ; but

Held, that the agreement was a contract to grant an interest in land, and that, as the vendor's failure to perform his contract was due solely to a defect in his title, the purchasers could not recover any damages for the loss of their bargain.

The principle of *Flureau* v. *Thornhill*, (1777) 2 W. Bl. 1078, and *Bain* v. *Fothergill*, (1874) L. R. 7 H. L. 158, applied. MORGAN *v.* RUSSELL & SONS - - - - **Div. Ct. 357**

VOTE—Franchise.
See under PARLIAMENT.

WAIVER—Rating—Waiver of condition precedent to appeal - - - - **652**
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WARRANTY—Insurance (Marine)—"Pirates," Meaning of in policy - - - **785**
See INSURANCE (MARINE).

WATER — London — "Building" — Reservoir authorized by special Act—Supervision of district surveyor - - - **744**
See LONDON. 2.

—— School—Supply of water—Liability of local education authority - - - **824**
See SCHOOLS.

WATERWORKS—*Reservoir—Land compulsorily taken — Special adaptability for Reservoir—Compensation.*

Where land is compulsorily taken for the purpose of making a reservoir, and the land has a special adaptability for the construction of a reservoir, the tribunal assessing the compensation is not precluded from taking into consideration the special adaptability as an element of value by reason of the fact that the land could not be utilized for the construction of a reservoir by other possible competitors unless statutory powers for its compulsory purchase were first obtained.

In determining the value arising from such special adaptability the tribunal should have regard to the contingent value arising from the possibility of the land coming into the market when required for the particular purpose, and not to the value of the realized possibility arising from the fact of the promoters having obtained statutory powers for the construction of the reservoir.

On appeal from the judgment of Bray J., reported [1908] 1 K. B. 571, the award was remitted to umpire. *In re* LUCAS AND CHESTERFIELD GAS AND WATER BOARD - - **C. A. 16**

WIFE.
See under HUSBAND AND WIFE.

WILD BIRDS — "*Recently taken*" — *Larks—Evidence—Wild Birds Protection Act*, 1880 (43 & 44 *Vict. c.* 35), *s.* 3—*Wild Birds Protection Act*, 1881 (44 & 45 *Vict. c.* 51), *s.* 2.

On the hearing of an information charging the defendant with knowingly and wilfully having in his possession certain wild birds recently taken contrary to s. 3 of the Wild Birds Protection Act, 1880, the evidence for the prosecution shewed that on July 30 the defendant, a dealer in wild birds, had on his premises in seven cages seven young larks ; that they were very wild, beating themselves against the bars of the cages ; and that their feathers were of a light colour.

The magistrate at the hearing, without calling on the defendant, dismissed the information on the ground that there was no evidence that the birds were "recently taken" within the meaning of the above enactment :—

Held, that there was evidence that the birds were recently taken within the meaning of the enactment, and that the magistrate was wrong in dismissing the information without calling on the defendant. HOLLIS *v.* YOUNG **Div. Ct. 629**

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WORKMEN'S COMPENSATION RULES. 1908 r. 4 - - - - - - - 191
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